Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

RITA J. CARLS, and NICHOLAS ANTHONY BERNARDONI and ANDREA R. BERNARDONI, minors by and through their Guardian ad Litem PETER BERNARDONI,

Petitioners,

v.

BLUE LAKE HOUSING AUTHORITY as successor-in-interest to J&L PROPERTIES,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners purchased a new home from a commercial construction company. The home was not on Indian tribal land or within a tribal reservation, and neither petitioners nor the company had any connection whatever to any Indian tribe. Respondent, a tribal business entity, then voluntarily acquired the construction company, assuming its liabilities. Petitioners' home suffered from water intrusion, resulting in high levels of toxic mold that left Petitioners ill and the house uninhabitable.

Question: When a tribe voluntarily acquires a non-tribal business, with existing contract obligations, does sovereign immunity allow the tribe to repudiate those obligations?

LIST OF ALL PARTIES

Petitioners: Rita J. Carls, and Nicholas Anthony Bernardoni and Andrea R. Bernardoni, minors and through their Guardian ad Litem Peter Bernardoni.

Respondent: Blue Lake Housing Authority as successor-in-interest to J&L Properties.

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LaSpaluto, David M., *A "Strikingly Anomalous," "Anachronistic Fiction": Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 San Diego L. Rev. 743 (1999) 16

Magagnini, Stephen, *The New Chiefs: A Quest for Recognition*, The Sacramento Bee, Dec. 1, 2007 15

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PETITION FOR WRIT OF CERTIORARI

Rita J. Carls, and Nicholas Anthony Bernardoni and Andrea R. Bernardoni, minors by and through their Guardian ad Litem Peter Bernardoni, respectfully petition for a writ of certiorari to the California Court of Appeal, Third Appellate District.

OPINIONS BELOW

The decision of the California Third District Court of Appeal is reproduced in the Appendix at A. The order of the California Supreme Court denying Petitioners' petition for review is reproduced in the Appendix at B. The opinions of the trial court and the court of appeal are unreported. The ruling of the California Superior Court granting Respondent's motions to quash is reproduced in the Appendix at C.

JURISDICTION

The order of the California Supreme Court denying review in this matter was entered on October 10, 2007. Appendix at B. On December 17, 2007, Justice Kennedy granted Petitioners' application for an extension of time within which to file this petition, to and including February 7, 2008.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

STATEMENT OF THE CASE

In March, 2000, Rita Carls purchased a home in El Dorado Hills, California, from J&L Properties, doing business as JTS Communities. Appendix (App.) at I17. J&L Properties was a non-tribal California general partnership that constructed non-tribal housing for sale on non-tribal land. *Id.* at A1. Ms. Carls moved into her home on March 31, 2000. Throughout the next few years, her grandchildren, Nicholas and Andrea Bernardoni, often stayed with her in the house.

Ms. Carls alleges that, in October, 2003, she discovered that her home suffered from construction defects that caused water intrusion and damage. App. at A2. J&L Properties performed certain repairs, which they claimed remedied the problems. *Id.* But in March, 2004, an environmental specialist proved J&L Properties wrong, discovering extremely high levels of toxic mold throughout the property resulting from the water intrusion. *Id.* Concerned about her and her grandchildren's health, Ms. Carls immediately abandoned the house.

In February, 2005, Ms. Carls and her grandchildren (collectively, Ms. Carls) filed a complaint for damages to their persons and to the home. The complaint named as defendants JTS Communities and J&L Properties dba JTS Communities, among others, and alleged various tort, statutory, and contract causes of action based on the construction defects in Ms. Carls's home that had resulted in the presence of water intrusion and toxic mold. The action was filed in the California Superior Court, for the County of El Dorado.

After filing the complaint, Ms. Carls was surprised to learn that J&L Properties no longer existed. App. at A11. About seven months earlier, on June 30, 2004, Blue Lake Housing Authority (Blue Lake) "acquired the assets and liabilities of J&L Properties, which ceased to exist as of that date." *Id.* at A3. Blue Lake is operated and controlled by a federally recognized Indian tribe, Blue Lake Rancheria, and is engaged in the business of homebuilding. *Id.*

Pursuant to a "Purchase and Sale Agreement for Assets and Liabilities," Blue Lake and J&L Properties agreed to a *de facto* merger, whereby Blue Lake became J&L Properties' "successor-in-interest." App. at A9, H2. Blue Lake thereby assumed the obligations and liabilities of J&L Properties. *Id.* at H5.

Among the obligations that Blue Lake acquired was the warranty contained in the purchase contract between Ms. Carls and J&L Properties. The purchase contract provides for arbitration of warranty-related disputes and expressly recognizes the jurisdiction of California and federal courts:

> Contract Supplement/Addendum, Warranty Coverage Procedures:
>
> [A]ll Disputes in any way related to the coverage of this Warranty shall be resolved according to . . . Section 5 . . . . [T]his Warranty requires Home Owner(s) to complete the entire process described below before filing any lawsuit against JTS Communities ***in state or federal courts.*** . . . [T]he parties agree that any offers of compromise or settlement are not admissible

> as evidence in the Arbitration or ***any later litigation***. . . . [U]nresolved aspects of the Dispute shall be resolved by Arbitration in accordance with the Commercial Arbitration Rules then in effect of the American Arbitration Association. . . . Home Owner(s) has the right to refuse to accept the results of Arbitration and take legal action ***in state or federal courts*** after the Arbitration decision ha[s] been issued. App. at I23, I24, I26-27 (emphasis added).

Contract of Purchase, Section 5:

> Judgment upon the award rendered by arbitration [of disputes regarding liquidated damages] may be entered ***in any court*** having jurisdiction hereof. The parties have the right to discovery in accordance with Code of Civil Procedure § 1283.05. App. at I3 (emphasis added).

Contract of Purchase, Section 23:

> In the event legal action is brought to enforce or interpret any provision of this Agreement or the escrow instructions executed pursuant thereto, the prevailing party shall be entitled to costs and reasonable attorney's fees and shall be fixed ***by the court***. App. at I16 (emphasis added).

At the time the complaint was filed, Ms. Carls had no knowledge that Blue Lake had acquired the assets and liabilities of J&L Properties, or that J&L Properties had since ceased to exist. App. at A11. Neither Blue Lake nor J&L Properties had provided

Ms. Carls with notice of the acquisition. *Id.* When Ms. Carls did find out, she filed an amended complaint in November, 2005, adding Blue Lake as a defendant and as successor-in-interest to J&L Properties. But her service of the complaint and summons on J&L Properties and Blue Lake was met with motions to quash. *Id.* at A1.

Blue Lake filed two motions to quash—one as a named defendant and the other as successor-in-interest to J&L Properties. App. at A1. Relying upon its affiliation with a tribe, Blue Lake argued that it was immune from suit under the doctrine of tribal sovereign immunity and that it did not consent to the superior court's jurisdiction. The superior court granted both motions to quash. *Id.* This, despite the fact that, in support of its motions to quash, Blue Lake filed the declaration of its chief operations officer, Michael Hansen, admitting that Blue Lake "acquired the assets and liabilities of J&L Properties, which ceased to exist as of that date." *Id.* at H5.

The Third District Court of Appeal of California affirmed. App. at A2. The court held that Blue Lake was entitled to immunity as a tribal business entity organized for a governmental purpose and closely linked in governing structure to the tribe. *Id.* at A6. The court rejected Ms. Carls's argument that Blue Lake had waived its immunity by acquiring J&L Properties' obligations and liabilities, including the warranty obligations in the home purchase contract containing the arbitration language. *Id.* at A8-A10. The court insisted upon proof of "some affirmative, express, clear and unequivocal action by Blue Lake agreeing to be bound by the terms of such contract"— apparently, something clearer and more

express than Mr. Hansen's unqualified admission that Blue Lake had "'acquired' the assets and liabilities of J&L Properties," as its "successor in interest." *Id.* at A9.

The court was nevertheless "sympathetic" to Ms. Carls's plight. App. at A10-11. It observed that Ms. Carls

> can have had no notice at the time of buying her house, which was not on any tribal land, from J&L Properties, a company apparently unconnected with any Indian tribe, that she would eventually run into the obstacle of tribal sovereign immunity when she tried to bring a court action seeking damages from alleged construction defects in the house.

Id. Ms. Carls's plight is worse than that: Even if she had found out about Blue Lake's purchase of J&L Properties on the day it occurred, she would have had no recourse against Blue Lake in tribal court. The acquisition of J&L Properties took place *after* the tribe's 90-day statute of limitations would have expired on Ms. Carls's tort claims, and *after* the 180-day statute of limitations would have expired on her contract claims. *Id.* at G5-G6.

Presiding Justice Arthur Scotland dissented from the decision. App. at A11. Justice Scotland concluded that the home purchase contract's arbitration clause providing that an award could be enforced in "any court having jurisdiction" operates as a waiver of immunity. *Id.* at A12. By acquiring the assets and liabilities of J&L Properties, Blue Lake "stepped into J&L Properties' shoes, effectively becoming a party to all the contracts between J&L and the buyers of the

homes that it built." *Id.* Blue Lake is presumed to have known of the arbitration clause in the contract it expressly assumed. *Id.* Therefore, Justice Scotland opined, Blue Lake waived its sovereign immunity. *Id.* at A13.

Ms. Carls's petition for review in the California Supreme Court was denied. App. at B1.

REASONS FOR GRANTING THE WRIT

Whether tribal immunity should be expanded to allow a tribe to avoid expressly assumed obligations involves an important federal question with significant consequences. The unprecedented rise in tribal commercial transactions across the county makes it all the more vital that tribes and non-tribal businesses and individuals understand the nature and scope of tribal immunity.

Issues of tribal sovereign immunity are matters of federal law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759 (1998). Federally recognized Indian tribes have long been afforded broad immunity from suit in state and federal courts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57-58 (1978). Although this Court has questioned the wisdom of applying sovereign immunity when tribes engage in off-reservation commercial conduct, it has been reluctant to narrow the doctrine.

In *Kiowa*, 523 U.S. at 756-58, dissent at 760-66, both the majority and dissent traced the history of tribal sovereign immunity, noting its questionable origins as a legal doctrine and the wisdom of perpetuating the doctrine in the context of off-

reservation commercial activities. Nevertheless, in that case, this Court reaffirmed the application of tribal immunity where a federally recognized tribe agreed to purchase stocks from a non-Indian business and then defaulted on a promissory note. "[A]n Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation commercial conduct—unless 'Congress has authorized the suit or the tribe has waived its immunity.'" *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 414 (2001), quoting *Kiowa Tribe* at 754.

More recently, *C&L Enterprises*, this Court addressed the waiver issue, holding that a tribe waives its immunity by agreeing to a contract containing arbitration and choice of law provisions for adjudication in state or federal courts. *Id.* at 420-21. The facts of the instant case are similar to those in *C&L Enterprises*; the contract in this case contains an arbitration clause providing that California law applies and accepting the jurisdiction of the state and federal courts. App. I3, I23-I30.

This case is different from *C&L Enterprises* in that the Indian tribe is not a party to the contract containing the waiver language. The tribe here is the successor-in-interest to the non-Indian construction company that built Ms. Carls's home on non-Indian land. But this is a distinction without legal significance. The waiver rule in *C&L Enterprises* logically should apply when a tribe purchases a preexisting business, and voluntarily and expressly assumes all the benefits and liabilities of that business, including the liabilities in preexisting contracts providing for arbitration of warranty issues. The

decision of the court below, upholding the tribe's immunity, works an unwarranted expansion of sovereign immunity. It holds that a tribe may avoid , by tribal immunity, even those obligations it has unqualifiedly assumed. The negative consequences of the decision are substantial.

I

SIGNIFICANT NEGATIVE CONSEQUENCES RESULT FROM AN EXPANSION OF TRIBAL IMMUNITY THAT RELEASES TRIBES FROM EXPRESSLY ASSUMED OBLIGATIONS

The negative implications of the lower court's expansion of sovereign immunity are significant. As a matter of federal law, an Indian tribe is subject to suit where it has waived its sovereign immunity. *Kiowa,* 523 U.S. at 754. To relinquish its immunity, a tribe's waiver must be clear. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (Indian tribes exercise inherent sovereign authority and suits against those tribes are thus barred by sovereign immunity absent a clear waiver.). And it must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58 (1978) citing *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. King*, 395 U.S. 1, 4 (1969) ("[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' "). However, a clear and unequivocal expression of waiver need not use particular language or terms of art, such as an explicit statement that sovereign immunity is waived. *See e.g., Rosebud Sioux Tribe v. Val-U*

Construction Co. of South Dakota, Inc., 50 F.3d 560, 561 (8th Cir. 1995).

C&L Enterprises, 532 U.S. at 411, involved a construction contract between a federally recognized Indian tribe and C&L Enterprises, Inc. (C&L), whereby C&L agreed to install a roof on a tribe-owned commercial building located on non-tribal land. The contract provided for arbitration of disputes. "All . . . disputes . . . arising out of . . . the Contract . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . . The award . . . shall be final, and judgment [] entered upon it in accordance with applicable law in any court having jurisdiction thereof." *Id.* The American Arbitration Association Rules provide that "judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id.* And the contract provided that "[t]he contract shall be governed by the law of the place where the Project is located." *Id.* This Court held that the tribe had waived its sovereign immunity. *Id.* at 423.

The contractual language in this case is similar. Blue Lake Housing Authority (Blue Lake) is an entity organized and operated by Blue Lake Rancheria, a federally recognized Indian tribe. App. at H5. Blue Lake acquired the assets and liabilities of J&L Properties on June 30, 2004. *Id.* On that date, J&L Properties ceased to exist. *Id.* Ms. Carls purchased a home from J&L Properties early in 2000. Carls subsequently learned that the home suffered from numerous construction defects and water intrusion problems.

Ms. Carls timely filed a complaint in state court for damages against J&L Properties, and others, after construction defects and related water intrusion resulted in the presence of toxic mold. The water and resulting mold caused property damage, personal injury, and other losses. It was not until after the complaint was filed that Ms. Carls discovered that J&L Properties had been sold to an Indian tribe, at which time she amended the complaint to name the tribe. The tribe claimed immunity from suit in the state court, filing two motions to quash—one as Blue Lake Housing Authority and one as successor in interest to J&L Properties. App. at A2. The motions were granted.

Blue Lake supported its motions to quash with the declaration of its Chief Operations Officer, Michael Hansen. App. at H5-6. Mr. Hansen explained that Blue Lake Housing Authority purchased J&L Properties and, as successor-in-interest, "acquired the assets and liabilities of J&L [P]roperties, which ceased to exist as of that date." *Id.* at H2, H5. The acquisition of the liabilities of J&L Properties included the liabilities associated with the warranty provisions of the preexisting contracts. The purchase contract between J&L Properties and Ms. Carls (hereafter home purchase contract) includes an agreement to arbitrate disputes and related provisions that are like those in the contract at issue in *C&L Enterprises.*

Like the contract in C&L, the home purchase contract in this case provides for arbitration of "all Disputes in any way related to the coverage of [the] Warranty." App. at I23; *see also* App. at I3. Disputes are to be resolved pursuant to the Commercial Arbitration Rules of the American Arbitration

Association (App. at I26-27), and the results of arbitration can be challenged in state or federal courts (App. at I27; *see also* App. at I30). It is clear that *C&L Enterprises* compels a conclusion that Blue Lake would have waived any tribal immunity had *it* entered into the relevant contract with Ms. Carls.

The lower court's decision to uphold immunity where Blue Lake assumed the contract's warranty obligations by assuming the liabilities of J&L Properties, rather than by "express" words, works an expansion of immunity that is wholly unjustified for the reasons expressed by Justice Stevens in his dissent in *Kiowa*. *Kiowa*, 523 U.S. at 760-66. There, Justice Stevens noted that the majority's decision to extend sovereign immunity ignored state interests and preempted state power. "The reasons that undergird our strong presumption against construing federal statutes to pre-empt state law, . . . apply with added force to judge-made rules." *Id.* at 764. Justice Stevens's concern was buttressed by seven States who joined in an amicus brief urging this Court not to expand sovereign immunity to instances where a tribe is a party to a contract.

> [S]tates have a strong interest in ensuring that Indian tribes and tribal businesses comply with generally applicable, nondiscriminatory civil laws, . . . [and] a distinct interest in providing a judicial forum for the fair and equitable resolution of civil contractual disputes between their non-Indian citizens and Indian tribes.

C&L Enterprises, Inc. v. Citizen Potawatomi Nation, S. Ct. Case No. 00-292, 2000 WL 1873817, *2, U.S. (Dec. 14, 2000). Amicus Brief of Texas, Alabama,

Arkansas, Kansas, Mississippi, Nebraska, and South Dakota in Support of Petitioner, in *C&L Enterprises, Inc.*, 532 U.S. 411. States are precluded from exercising these interests under the expansion of sovereign immunity adopted by the court below.

The lower court's expansion of sovereign immunity in this case effectively preempts, indeed nullifies, various California statutes when a non-Indian seeks to enforce a contract against an Indian tribal entity. Blue Lake is the successor-in-interest to J&L Properties, App. at H2, and expressly states that it acquired J&L Properties' liabilities, App. at H5. Under California law, those liabilities include the warranty obligations J&L Properties acquired when entering into purchase contracts with home buyers like Ms. Carls.[1]

The result of the lower court's decision is also "strikingly anomalous," in that it permits Blue Lake to utterly extinguish Ms. Carls's bargained-for contractual rights. *See Kiowa* at 766 (Stevens, J., dissenting). The result is particularly unjust because Ms. Carls did not voluntarily enter into a contractual relationship with a tribe, and had no opportunity to negotiate for a waiver of immunity from suit. *See Kiowa* at 766. And the negotiated terms of the home purchase agreement are nullified. The application of sovereign immunity allowed Ms. Carls to be

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[1] "He who takes the benefit must bear the burden." Cal. Civ. Code § 3521. "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." *Id.* § 1589; Cal. Code of Civ. Proc. § 1293; *see also* App. at F.

blind-sided: without her knowledge, without notice, or fair warning, J&L Properties sold itself to an Indian tribe leaving her subject to the vagaries of tribal council law. The sale of the construction company occurred after the tribe's statute of limitations had expired, thus creating the situation wherein Ms. Carls's timely-filed State Court complaint is untimely to the tribal court, denying her any forum to bring her claims against Blue Lake.

For all the reasons described in Justice Stevens's dissent in *Kiowa*, sovereign immunity should not be expanded to relieve Blue Lake of its obligations to Ms. Carls.

II

THE INCREASED NUMBER OF TRIBAL COMMERCIAL TRANSACTIONS WITH NON-TRIBAL BUSINESSES AND INDIVIDUALS ON NON-TRIBAL LANDS MAKES THE QUESTION PRESENTED ALL THE MORE PRESSING

There are 108 federally recognized Indian tribes in California. Fifty-seven of those tribes have casino operations, some reaping up to $300 million a year. Stephen Magagnini, *The New Chiefs: A Quest for Recognition*, The Sacramento Bee, Dec. 1, 2007, at A1. The Bureau of Indian Affairs recognizes 561 tribal governments nationwide. *See* http://www.doi.gov/bureau-indian-affairs.html, (last visited Jan. 28, 2008). Tribes own or operate "smoke shops, fuel stations, convenience stores, casinos, hotels, golf courses, agribusinesses, and banks on more than 300 Indian reservations located throughout the United

States." R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 Am. Ind. L. Rev. 177, 179 (2002-2003); David M. LaSpaluto, *A "Strikingly Anomalous," "Anachronistic Fiction": Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 San Diego L. Rev. 743, 747 (1999) (same). "It is anticipated that such economic growth and development, along with budding political influence, will substantially increase over the next ten years." Clift, *supra*, at 179-180.

As tribal businesses continue to increase their commercial activities off tribal lands, serious concerns regarding the propriety of the kind of expanded sovereign immunity endorsed by the lower court in this case are surfacing:

> As tribes and tribal organizations enter into more commercial transactions in an effort to promote their self-determination and economic development, they have used sovereign immunity as a "trap for the unsuspecting," leaving the business they enter into an agreement with, without a judicially enforceable remedy for breach of contract.

Michael Stoffregen, *The Inferred Explicit Standard—Waiver of Sovereign Immunity Via An Arbitration Clause*, 1997 J. Disp. Resol. 165.

The courts have underscored the importance of deciding the scope of sovereign immunity—and, specifically, whether it should apply to commercial

activities with non-Indians off Indian land. For example, Judge Pamela Rymer of the Ninth Circuit Court of Appeals has concluded that "whether tribal sovereign immunity now extends to commercial activities is an important, complex, and unresolved question." *Greene v. Mt. Adams Furniture*, 980 F.2d 590, 600 (9th Cir. 1992) (Rymer, J., concurring). That is so because "[the] common law sovereign immunity has evolved to be inapplicable to commercial activity by a sovereign and because such an exception is based on the important principle that it is disfavored for a commercial actor to escape the legal consequences of its actions." *Id.*

While expansion of tribal immunity produces serious negative consequences, particularly for the unwitting non-tribal party, it advances none of the historical policies favoring Native Americans. This Court and legal commentators have at various times characterized the policy behind tribal sovereign immunity as promoting "Indian self-government, self-sufficiency, and economic development." *Oklahoma Tax*, 498 U.S. at 505-06; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 892 (1986) (describing the "federal interest" in "guarding Indian self-governance"); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 Cal. L. Rev. 799, 848 n.83 (2007) ("Despite its controversial nature, tribal sovereign immunity is essential to tribal self-government."); Sandra J. Schmieder, Comment, *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment*, 74 U. Colo. L. Rev. 765, 792 (2003) ("Tribal sovereign immunity facilitates the independence of Indian tribes . . . ."). But allowing a

tribe to avoid expressly assumed obligations and liabilities does *nothing* to advance tribal self-government, self-sufficiency, or economic development.

First, purely commercial transactions like the one at issue in this case—the acquisition of a non-tribal home construction business on non-tribal land—have no bearing on self-government. Even if they did, tribal self-government would receive no benefit from expanded tribal immunity. Self-government is promoted by recognizing the power of tribes to control their own affairs, without improper interference by federal, state or local governments. Holding a tribe to its express assumption of obligations and liabilities does just that: It respects and upholds the business decisions voluntarily made by a tribe, in its exercise of self-governance.

Second, expansion of tribal immunity does nothing for tribal self-sufficiency. In fact, such expansion works the exact opposite effect. It makes tribes unduly dependent upon the courts for special treatment in the performance of commercial transactions. Though a tribe might voluntarily and expressly assume certain obligations in business dealings, its ever-growing scope of immunity will allow the tribe to rely upon the courts to undo those commitments. This is not tribal self-sufficiency; it is judicial paternalism.

Third, tribal economic development derives no benefit from judicial expansion of tribal immunity. If anything, permitting tribes to avoid expressly assumed obligations under the cover of immunity positively undermines their economic development. It discourages non-tribal businesses and individuals from transacting with tribes out of fear that, with the help of the courts, tribes will be able to avoid obligations

and liabilities—let alone an adequate forum for disputes. As one commentator has noted,

> As tribes continue to become commercially attractive to outside partners, investors, and the public, the need exists for tribes to establish 'legal certainties' by adopting the necessary and predictable business codes and designating legal fora for resolving commercial and noncommercial disputes. The tribes' sovereign status as independent nations make legal disputes frustrating and intimidating to many nontribal entities, ultimately leading to complex, time-consuming, and expensive jurisdictional disputes. In an effort to exude an amicable commercial disposition, tribes oftentimes will, as a practical matter and business decision, accept limitations or waive sovereign immunity in certain legal fora in order to garner valuable and necessary commercial interaction with the private and public sectors.

Clift, *supra*, at 180.

Even if just a few tribes are able to obtain judicial expansions of tribal immunity to avoid assumptions of obligations, the rest suffer. Non-tribal entities and individuals will find it risky to transact with Indian tribes. This result does not advance tribal economic development; it impedes it.

CONCLUSION

This case presents the Court with an important opportunity to make clear the scope of sovereign immunity, particularly given the unmitigated costs of its continued expansion. The growth of tribal commercial transactions makes it all the more imperative for tribes, and their non-tribal business partners and customers, to have a clear understanding of whether and to what extent tribal obligations can be avoided.

The petition for writ of certiorari should be granted.

DATED: February, 2008.

Respectfully submitted,

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and Andrea R. Bernardoni,
minors by and through their
Guardian ad Litem
Peter Bernardoni

APPENDIX

Appendix A1

Not Officially Published

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Third District, California.

Rita J. CARLS et al.,
Plaintiffs and Appellants,
v.

BLUE LAKE HOUSING AUTHORITY,
Defendant and Respondent.

No. C052660.
(Super. Ct. No. PC20050114).

July 17, 2007.

CANTIL-SAKAUYE, J.

Plaintiffs appeal the trial court's orders granting the two motions to quash (Code Civ. Proc., § 418.10, subd. (a)(1)) brought by Blue Lake Housing Authority (Blue Lake) and by Blue Lake as successor in interest to J & L Properties on the grounds of tribal sovereign immunity.[1] Plaintiffs contend the trial court erred in extending tribal sovereign immunity to activities involving a non-tribal construction company constructing non-tribal housing for sale on non-tribal land and by failing to find the sales contract effected

[1] An order granting a motion to quash service of summons is an appealable order under Code of Civil Procedure section 904.1, subdivision (a)(3).

an express waiver of any sovereign immunity. We affirm the order granting the motions to quash.

BACKGROUND

In November 2005, plaintiffs filed a first amended complaint for damages against JTS Communities, J & L Properties doing business as JTS Communities, Blue Lake (together designated "developer defendants" [capitalization omitted]), North Star Plumbing, Daniel Longacre (together designated "inspection defendants" [capitalization omitted]), and The Advantage Group New Home Marketing, Inc. (designated "broker defendant" [capitalization omitted]). The complaint alleged various tort, statutory and contract causes of action arising out of plaintiff Rita Carls's purchase of a home in the Serrano subdivision of El Dorado Hills in El Dorado County. Plaintiffs alleged the home contained construction defects that resulted in water intrusion, which in turn resulted in toxic mold, which defects were concealed, not disclosed on inspection, and not properly repaired upon discovery, causing both property damage, personal injury, and various other losses.

Blue Lake filed two motions to quash, one as a named defendant and one as successor in interest to J & L Properties, alleging it was immune from suit under the doctrine of tribal sovereign immunity. Blue Lake contended it was a tribal business entity entitled to the sovereign immunity extended to the Blue Lake Rancheria Indian tribe citing *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal. App. 4th 632 (*Trudgeon*). Blue Lake's motions were supported by a declaration of Michael Hansen, its chief operations officer.

In his declaration, Hansen stated Blue Lake was "a tribal governmental instrumentality of Blue Lake Rancheria[,]" a federally recognized Indian tribe, that Blue Lake is "an entity organized and operated by [the tribe] to promote the business and economic interests of the Tribe[,]" that Blue Lake "is engaged in the business of building homes[,]" that it is "an arm of the Tribe in that its business endeavors are dictated by the Tribe's five member Charter Development Corporation (CDC) which determines and manages the Tribe's economic activities[,]" that on June 30, 2004, Blue Lake "acquired the assets and liabilities of J & L properties, which ceased to exist as of that date[,]" that the tribe has "a tribal claims ordinance which governs the filing and adjudication of claims against the Tribe or any of its business enterprises [,]" that Blue Lake "does not consent or agree to jurisdiction" in the state court, and has not, to Hansen's knowledge, waived its sovereign immunity by any act or communication.

Plaintiffs opposed the motions of Blue Lake contending Blue Lake did not have tribal sovereign immunity for the non-tribal acts of its non-tribal predecessor company that developed homes on non-tribal land. Plaintiffs contended Blue Lake was responsible for J & L's liabilities as its successor in interest and such liabilities were properly contested in the superior court. Plaintiffs claimed *Trudgeon, supra,* 71 Cal. App. 4th 632 was distinguishable as it dealt with a bingo hall that was constructed by the tribe and located on tribal land. Plaintiffs contended the facts of this case were more akin to those of two out-of-state cases cited by *Trudgeon*. (*Dixon v. Picopa Const. Co.* (1989) 160 Ariz. 251 [772 P.2d 1104] (Dixon); *Padilla v. Pueblo of Acoma* (1988) 107 N.M. 174 [754 P.2d 845]

(*Padilla*).) Plaintiffs submitted no evidence in support of their opposition.

The trial court issued a tentative ruling granting Blue Lake's motions to quash. Plaintiffs requested oral argument. Although plaintiffs' written opposition raised no issue of Blue Lake's waiver of tribal immunity, the parties agree plaintiffs argued orally at the subsequent hearing on Blue Lake's motions that an arbitration clause contained in the sales agreement between plaintiff Carls and J & L Properties operated as an express waiver of Blue Lake's sovereign immunity. The trial court rejected plaintiffs' waiver argument and granted Blue Lake's motions. This appeal followed.

DISCUSSION

A defendant bringing a motion to quash under Code of Civil Procedure section 418.10 must present some admissible evidence (declarations or affidavits) to place the issue of lack of jurisdiction before the court. (*School Dist. of Okaloosa County v. Superior Court* (1997) 58 Cal. App. 4th 1126, 1131.) Once the defendant does so, "the burden of proof is on the plaintiff to establish, by a preponderance of the evidence, a basis for jurisdiction," normally personal jurisdiction, but here subject matter jurisdiction over a defendant claiming to be an arm of an Indian tribe. (*Ibid.*) The question of whether a court has subject matter jurisdiction over an action against an Indian tribe is generally a question of law subject to de novo review on appeal. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal. App. 4th 1170, 1180 (*Warburton*).)

Although even the United States Supreme Court recognizes there are "reasons to doubt the wisdom of perpetuating the doctrine" (*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 758 [140 L. Ed. 2d 981, 987] (*Kiowa*)), it is still settled law that (with the possible exception of a state asserting federal constitutional claims) an Indian tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (*Id.* at p. 754 [140 L. Ed. 2d at p. 985]; *see Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 [56 L. Ed. 2d 106, 115] (Santa Clara Pueblo); see *United States v. United States Fidelity & Guaranty Co.* (1940) 309 U.S. 506, 512 [84 L. Ed. 894, 899]; *Redding Rancheria v. Superior Court* (2001) 88 Cal. App. 4th 384, 387 (*Redding Rancheria*); compare *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal. 4th 239.) "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, [citations], and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." (*American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe* (8th Cir. 1985) 780 F.2d 1374, 1377-1378.) Tribal sovereign immunity applies to commercial as well as governmental activities, both on and off tribal land. (*Kiowa, supra*, at p. 760 [140 L. Ed. 2d at p. 988]; *Redding Rancheria, supra*, at p. 388.) It extends to both contract and tort claims against a tribe. (*Trudgeon, supra*, 71 Cal. App. 4th at pp. 636-637; *Redding Rancheria, supra*, at pp. 389-390.)

Tribal sovereign immunity may also extend to tribal business entities. (*Trudgeon, supra*, 71 Cal. App. 4th at pp. 636-642; *Redding Rancheria, supra*, 88 Cal.

App. 4th at pp. 388-389; *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority* (1st Cir. 2000) 207 F.3d 21, 29 ["The [Housing] Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"].) To determine whether to extend tribal immunity to a particular tribal business entity, courts consider three relevant factors. These are: "'1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; [¶] 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and [¶] 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.'" (*Trudgeon, supra,* at pp. 638-639, following *Gavle v. Little Six, Inc.* (Minn. 1996) 555 N.W.2d 284, 294.)

Here Blue Lake submitted a declaration of its chief operations officer addressing these factors. According to the declaration Blue Lake is a "tribal governmental instrumentality" of a federally recognized Indian tribe; it is "organized and operated by" the tribe "to promote the business and economic interests" of the tribe and "its business endeavors are dictated by the Tribe's five member Charter Development Corporation (CDC) which determines and manages the Tribe's economic activities." Although conclusory, these statements were adequate to bring Blue Lake within the factors identified by *Trudgeon.* The burden shifted to plaintiffs to challenge Blue Lake's assertion of tribal immunity. To meet this burden, plaintiffs could have conducted discovery limited to the jurisdictional issue raised by Blue Lake's motions. (*Warburton, supra,* 103 Cal. App. 4th at p. 1190; *Factor Health*

Management v. Superior Court (2005) 132 Cal. App. 4th 246, 250; *School Dist. of Okaloosa County v. Superior Court, supra*, 58 Cal. App. 4th at p. 1132.)

There is nothing in the record suggesting plaintiffs did so. Plaintiffs simply filed oppositions focusing on the fact Blue Lake's predecessor in interest, J & L Properties, was not an Indian tribe, had nothing to do with any Indian tribe when it developed the homes in the Serrano area, and had constructed plaintiff's home on non-tribal land. Plaintiffs argued Blue Lake's responsibility for J & L Properties' liabilities, distinguished the facts of *Trudgeon* from this suit seeking redress for the actions of J & L Properties, and argued tribal sovereign immunity should not be extended to a construction company that is not related to the function and purpose of the tribe, citing out-of-state cases (*Dixon, supra*, 160 Ariz. 251 [772 P.2d 1104]; *Padilla, supra* 107 N.M. 174 [754 P.2d 845]) decided prior to *Kiowa, supra*, 523 U.S. 751, 760 [140 L. Ed. 2d 981, 988]. However, plaintiffs submitted no evidence that Blue Lake was not related to the function and purpose of the tribe. (*See Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal. 4th 239, 247-248 [tribal immunity "'apparently does not cover tribally chartered corporations that are completely independent of the tribe'"], quoting Cohen, Handbook of Federal Indian Law (2005 ed.) § 7.05[1][a], p. 636.) Plaintiffs submitted no *evidence* Blue Lake was subject to state suit for the liabilities of J & L Properties. Plaintiffs submitted no evidence at all in opposition to Blue Lake's motions. On this record, we must conclude Blue Lake established it was an arm of the tribe, entitled to

tribal sovereign immunity. (*See Redding Rancheria, supra*, 88 Cal. App. 4th at p. 389.)

Tribal immunity, however, may be waived. (*C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.* (2001) 532 U .S. 411, 418 [149 L. Ed. 2d 623, 631] (*C & L Enterprises*).) While no magic words specifically referencing "sovereign immunity" are required (*Id.* at pp. 420-421 [149 L. Ed. 2d at p. 632]), the "tribe's waiver must be 'clear.'" (*Id.* at p. 418 [149 L. Ed. 2d at p. 631.) It ""cannot be implied but must be unequivocally expressed."" (*Santa Clara Pueblo, supra*, 436 U.S. 49, 58 [56 L. Ed. 2d at p. 115]; *see, e.g., Allen v. Gold Country Casino* (9th Cir. 2006) 464 F.3d 1044, 1047; *Demontiney v. United States* (9th Cir. 2001) 255 F.3d 801, 812-813.) Put another way, it must be "unmistakable." (*Arizona Public Service Co. v. Aspaas* (9th Cir. 1995) 77 F.3d 1128, 1135.) "Waivers are 'strictly construed' [citation], and there is a 'strong presumption' against them. [Citation.]" (*Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1193-1194 (*Big Valley*).)

Plaintiffs point to the arbitration language in the purchase contract between plaintiff and J & L Properties as evidence of a clear and express waiver of tribal immunity. It is true similar language of an arbitration clause has been held to be a waiver, at least a limited waiver (*Big Valley, supra*, 133 Cal. App. 4th at pp. 1193-1195) of a tribe's sovereign immunity. (*C & L Enterprises, supra*, 532 U.S. at p. 423 [149 L. Ed. 2d at p. 634]; *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal. App. 4th 1, 6 [arbitration clause in contract is explicit waiver of immunity].) But the

contract to which plaintiffs point is not a contract between Blue Lake and plaintiff Carls. It is plaintiff Carls's contract with Blue Lake's predecessor in interest, J & L Properties. For such contract to constitute Blue Lake's waiver of tribal immunity, plaintiffs must show some affirmative, express, clear and unequivocal action by Blue Lake agreeing to be bound by the terms of such contract. Plaintiffs simply argue Blue Lake is bound as successor in interest to J & L Properties. The problem for plaintiffs once again is evidentiary.

The declaration of Blue Lake's chief operations officer states Blue Lake "acquired" the assets and liabilities of J & L Properties, which ceased doing business on June 30, 2004. The declaration does not state the manner of Blue Lake's acquisition.[2] A business successor in interest may assume its predecessors liabilities in a number of ways, including express or implied agreements of assumption or the consolidation or merger of two corporations. (*Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust* (2002) 95 Cal. App. 4th 1182, 1188; *Petrini v. Mohasco Corp.* (1998)

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[2] In its points and authorities in support of its motions to quash, Blue Lake references a purchase and sale agreement between it and J & L Properties, but it also states a "de facto merger" between the two occurred. It notes a merger may effect an assumption of liabilities "by operation of law" and then states this is especially true where there is an express agreement that the acquiring entity will assume all obligations and liabilities. No where does Blue Lake actually state the purchase and sale agreement it signed with J & L Properties contains an express assumption of liabilities. Moreover, these comments are not evidence. They are arguments of counsel in Blue Lake's points and authorities. (See *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal. App. 4th 573, 578 [matters in points and authorities are not evidence].)

61 Cal. App. 4th 1091, 1094; Corp. Code, § 1107.) A waiver of tribal immunity, however, cannot be based on implication or operation of law. It must be express. (*Santa Clara Pueblo, supra,* 436 U.S. at p. 58 [56 L. Ed. 2d at p. 115].) Thus, while as a theoretical premise Blue Lake might have waived its tribal sovereign immunity by expressly assuming J & L Properties' obligations and liabilities under its sales contracts with its home buyers (no magic words referencing "sovereign immunity" are necessary and waiver can be found based on a tribe's agreement to contractual terms incorporating other matters (*see C & L Enterprises, supra,* 532 U.S. at p. 419, fn. 1 and pp. 420-421 [149 L. Ed. 2d at pp. 632, 633]), to establish such fact plaintiffs needed to provide in evidence a copy of the agreement between Blue Lake and J & L Properties.[3] Without such agreement, neither the trial court nor this court can evaluate whether Blue Lake has expressed a clear and unequivocal waiver of its tribal immunity. Without such evidence, plaintiffs failed to establish the unmistakable waiver necessary to show subject matter jurisdiction over Blue Lake in this action.

We are not unsympathetic to plaintiffs' situation. Plaintiff Carls can have had no notice at the time of buying her house, which was not on any tribal land, from J & L Properties, a company apparently

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[3] Again, plaintiffs could have conducted discovery to obtain evidence of Blue Lake's acquisition of J & L Properties' assets and liabilities. (*Warburton, supra,* 103 Cal. App.4th at p. 1190.)

unconnected with any Indian tribe, that she would eventually run into the obstacle of tribal sovereign immunity when she tried to bring a court action seeking damages from alleged construction defects in the house. She had no control over, and probably no notice of, the decision of J & L Properties to go out of business, transferring its assets and liabilities to a tribal business entity. Nevertheless, a court does not have power to deprive an Indian tribe of its sovereign immunity based on the equities. (*Big Valley, supra,* 133 Cal. App. 4th at pp. 1195-1196; *Warburton, supra,* 103 Cal. App. 4th at p. 1182; *Ute Distributing Corp. v. Ute Indian Tribe* (10th Cir. 1998) 149 F.3d 1260, 1267.)

DISPOSITION

The order granting respondent's motions to quash is affirmed. Costs on appeal are awarded to respondent. (Cal. Rules of Court, rule 8.276(a).)

I concur: SIMS, J.

SCOTLAND, P.J.

In my view, the trial court erred in granting the motions to quash. (Code Civ. Proc., § 418.10.)

Rita Carls purchased a home built by J & L Properties in the Serrano subdivision of El Dorado Hills. When she discovered construction defects, she sued J & L Properties and its successor in interest, Blue Lake Housing Authority, as well as a subcontractor, the inspectors, and the real estate broker.

The Blue Lake Rancheria Indian tribe filed a motion to quash on the ground that its sovereign immunity makes it immune from suit in state court. The trial court agreed.

On appeal, Carls contends that sovereign immunity should not extend to the successor in interest to a non-tribal construction company that builds non-tribal housing on non-tribal land and that, in any event, the purchase contract contains an arbitration clause saying the award may be enforced in "any court having jurisdiction," language that has been interpreted in other cases to operate as a waiver of sovereign immunity.

In my view, the second argument has merit.

Courts have held that an arbitration clause which states that an award in a dispute arising out of a contract can be enforced "in any court having jurisdiction thereof" operates as a waiver of sovereign immunity if the tribe is a party to the contract. (E.g., *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal. App. 4th 1, 6.) By acquiring the assets *and liabilities* of J & L Properties, the tribe stepped into J & L Properties' shoes, effectively becoming a party to all the contracts between J & L and the buyers of the homes that it built. The tribe is presumed to have known of the arbitration clause in the contracts, allowing any court to enforce an award of damages arising out of the contracts. I know of no legal basis upon which the tribe could acquire the contractual liabilities of J & L Properties without also assuming the contractual burden that the liabilities could be enforced in state court. It is all or nothing as I

understand the law. (Civ. Code, § 1589 ["A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting"]; Civ. Code, § 3521 ["He who takes the benefit must bear the burden"].)

Thus, the tribal chief operations officer's declaration that the tribe acquired J & L's liabilities constitutes an affirmative expression that, in doing so, the tribe agreed to be subject to state court enforcement of damages arising out of the J & L home sales contracts, thereby waiving its sovereign immunity with respect to claims arising out of those contracts.

Accordingly, I would reverse the trial court's orders.

Appendix B1

Court of Appeal, Third Appellate District—
No. C052660
S155798

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RITA CARLS, et al., Plaintiffs and Appellants,

v.

BLUE LAKE HOUSING AUTHORITY, Defendant and Respondent.

The petition for review is denied.

Kennard, J., of the opinion the petition should be granted.

SUPREME COURT
FILED
OCT 10 2007
Frederick K. Ohlrich Clerk

DEPUTY

/S/GEORGE
Chief Justice

Appendix C1

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

RITA J. CARLS, et al.)	
)	CASE NO: PC20050114
Plaintiffs)	
)	RULING ON
vs.)	DEFENDANTS' MOTION
)	TO QUASH SERVICE OF
JTS COMMUNITIES,)	SUMMONS
et. al.)	
)	FILED; 3-20-06
Defendants.)	

The Court issued a tentative ruling on February 23, 2006, granting Defendants JTS Communities and Blue Lake Housing Authority's motion to quash service of summons. The Plaintiff requested oral argument. On March 3, 2006, the Court heard oral argument from both sides and the matter was taken under submission.

After consideration of the arguments presented and review of *Bodrell Joer' Dan Smith v. Hopland Band of Pomo Indians*, 95 Cal. App. 4th 1 cited by Plaintiff, the Court rules as follows:

The Motions to Quash Service of Summons are granted as to Defendants JTS Communities and Blue Lakes Housing Authority. The Tentative Ruling dated February 23, 2006 is the ruling of the Court.

Dated: March 20, 2006 /s/Daniel B. Proud
Judge of the Superior Court
[Seal of the State of California]

Appendix D1

Law and Motion Calendar—Department Nine
February 23, 2006

4. CARLS v. JTS COMMUNITIES PC-20050114

(1) Defendant Blue Lake Housing Authority's Motion to Quash Service of Summons.

(2) Defendant JTS Communities' Motion to Quash Service of Summons.

On February 28, 2005 plaintiffs filed an action against defendants J&L Properties, Blue Lake Housing Authority (Authority) and others related to alleged defective construction of a home that allegedly resulted in, among other things, water intrusion and the growth of toxic mold. The 1st Amended Complaint alleges that plaintiff Carls purchased the subject home in or about late March 2000 from the developer defendants, which included defendant J&L Properties d.b.a. JTS Communities. There is evidence that defendant Authority is a tribal governmental instrumentality of the Blue Lake Rancheria, which is a federally recognized Indian Tribe and that on June 30, 2004 the defendant Authority acquired the assets and liabilities of J&L Properties, which ceased to exist as of that date.

Defendants Authority and J&L Properties d.b.a. JTS Communities have filed identical motions to quash service of the summons on the grounds of lack of jurisdiction. Both of those defendants contend that defendant Authority, who purchased the assets and liabilities of defendant J&L Properties d.b.a. JTS

Communities, is an arm of the Tribal government that is immune from being sued in the State Court system and has not consented to being sued in this Court concerning the matters raised in this litigation.

Plaintiffs oppose both motions on the grounds: that a construction company is not related to the function and purpose of the tribe and is not immune; that construction activity off the reservation prior to the tribe's purchase of the J&L Properties is not protected by tribal immunity; and that extending immunity to defendant Authority would not further the federal policy seeking to protect tribal assets.

The critical issue that must be determined in ruling on these motions to quash is whether or not a State Court has jurisdiction over a tribal entity that is otherwise immune from litigation being pursued against it in State Courts where that tribal entity has purchased a company previously owned by non-tribal members, which was previously operated as a private commercial enterprise to the alleged injury of a plaintiff. In other words, does a tribal entity in purchasing a private non-tribal commercial enterprise and assuming the assets and liabilities of that privately owned non-tribal commercial enterprise by operation of law also submit to the jurisdiction of State Courts related to litigation of liability claims concerning conduct of the prior private non-tribal commercial organization that pre-dates the acquisition of that commercial enterprise?

Sovereign Immunity of Tribal Entities

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2312-2313, 90 L. Ed. 2d 881 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1676-1677, 56 L.Ed.2d 106 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 656, 84 L. Ed. 894 (1940) (*USF & G*). To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. In one case, a state court has asserted jurisdiction over tribal fishing "both on and off its reservation." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 167, 97 S. Ct. 2616, 2618, 53 L. Ed.2d 667 (1977). We held the Tribe's claim of immunity was "well founded," though we did not discuss the relevance of where the fishing had taken place. Id., at 168, 172, 97 S. Ct., at 2619, 2621. Nor have we yet drawn a distinction between governmental and commercial activities of a tribe. See, e.g., ibid. (recognizing tribal immunity for fishing, which may well be a commercial activity); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (recognizing tribal immunity from suit over taxation of cigarette sales); *USF & G*, supra, (recognizing tribal immunity for coal-mining lease). Though respondent asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions. ¶ Our cases allowing States

to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S. Ct. 1267, 1270-1271, 36 L. Ed. 2d 114 (1973); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S. Ct. 562, 570-571, 7 L. Ed. 2d 573 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510, 111 S. Ct., at 909-910. There is a difference between the right to demand compliance with state laws and the means available to enforce them. See id., at 514, 111 S. Ct., at 911-912." (Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. (1998) 523 U.S. 751, 754-755.)

In Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384 the Third District Court of Appeal issued a writ of mandate directing the trial court to vacate its order denying the defendant tribe's motion to quash and to enter a new order granting the motion to quash service of summons and complaint where a tort action was brought by a hotel employee against a tribal entity that booked the hotel's banquet room, which was not located on the tribe's reservation premises. The Third District stated among other things: "An aboriginal American tribe is a sovereign nation and "As a matter of federal law, . . . is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." (*Kiowa*, supra, 523

U.S. at p. 754, 118 S.Ct. 1700; see *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal. App. 4th 1407, 1419-1420, 88 Cal. Rptr. 2d 828 (*Morongo Band*).)" (Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384, 387.)

""Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.' [Citation.] . . .[¶] 'It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.' *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (internal quotations omitted)." ¶ It must be recognized that "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation. [Citation.]" (*Chemehuevi Ind. Tribe v. Cal. St. Bd. of Equal.* (9th Cir. 1985) 757 F.2d 1047, 1052, fn. 6 (reversed in other pt. in *Cal. Bd. of Equalization v. Chemehuevi Indian Tribe* (1985) 474 U.S. 9, 106 S. Ct. 289, 88 L. Ed. 2d 9.) Rather, it presents a pure jurisdictional question. (*Chemehuevi Ind. Tribe v. Cal. St. Bd. of Equal.*, supra, 757 F.2d at p. 1051; see also *Ute Distribution Corp. v. Ute Indian Tribe* (10th Cir. 1998) 149 F.3d 1260, 1267: the requirement that a waiver of tribal immunity must be clear and express is not a doctrine that may be flexibly applied or disregarded based upon the particular facts.)" (Emphasis added.) (Warburton/Buttner v. Superior Court (2002) 103 Cal.App.4th 1170, 1182.)

The Third District Court of Appeal has held: "Tribal immunity applies to commercial as well as governmental activities: "Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. [Citations.] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit." (*Kiowa*, supra, 523 U.S. at p. 755, 118 S. Ct. 1700 [pointing to Potawatomi case].) Contrary to plaintiff's v w, no "tribal goal" is required to conclude a tribal activity is immunized. Nor is it necessary to determine whether, absent the immunity, a Tribe's ability to self-govern would be infringed. (See *Padilla v. Pueblo of Acoma* (1988) 107 N.M. 174, 178, 754 P.2d 845, 849 (*Padilla*) ["the infringement test applies to individual Indians and is inapplicable to the exercise of state court jurisdiction over an Indian tribe that has invoked its sovereign immunity"].) *Padilla*, relied on by plaintiff, did conclude immunity for off-reservation conduct "is solely a matter of comity." (Id. at p. 179, 754 P.2d at p. 850, cert. den. sub nom. *Pueblo of Acoma v. Padilla* (1989) 490 U.S. 1029, 109 S. Ct. 1767, 104 L. Ed. 2d 202 [White, J., dissenting from denial of cert., due to conflict among state courts on this question].) Well-reasoned cases have rejected this view. (See, e.g., *Sac and Fox Nation v. Hanson* (10th Cir. 1995) 47 F.3d 1061, 1064-1065 [rejecting analogy of Indian Tribe to foreign sovereign; "we do not believe that the location of the commercial activity is determinative"]; *In re Greene* (9th Cir. 1992) 980 F.2d 590, 593-597 [questioning *Padilla* "sovereign immunity, as it existed at common law, had an extra-territorial component".

Padilla "should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law"]; *Morgan v. Colorado River Indian Tribe* (1968) 103 Ariz. 425, 443 P.2d 421 (*Morgan*) [Tribe immune from off-reservation tort suit]. See also *Puyallup Tribe v. Washington Game Dept.* (1977) 433 U.S. 165, 172-173, 97 S. Ct 2616, 2620-2622, 53 L. Ed. 2d 667, 674 [State could not sue Tribe for off-reservation conduct, only tribal members].) The comity rationale has no further viability. (See, *Kiowa*, supra, 523 U.S. at p. 760, 118 S. Ct. 1700 ["Tribes enjoy immunity from suits on contracts, . . . whether they were made on or off a reservation"]; *Thompson v. Crow Tribe of Indians* (1998) 289 Mont. 358, 364, 962 P.2d 577, 581 [suit to cancel liens Tribe filed with county recorder, "the fact that the Tribe's action in filing its tax liens occurred off-reservation is of no consequence as regards its defense of sovereign immunity", citing *Kiowa*].) ¶ 3. A tribal entity is treated as the Tribe for immunity purposes. (See *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.* (1st Cir. 2000) 207 F.3d 21, 29 ["The Authority, as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"] (*Ninigret Dev. Corp.*); *Chance v. Coquille Indian Tribe* (1998) 327 Or. 318, 321, 963 P.2d 638, 639.)" (Emphasis added.) (Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384, 388-389.)

The proper focus is on the immunity of the tribal enterprise, not whether or not it acquired liabilities that pre-date acquisition of a private non-tribal enterprise. Tribal entities as an arm of the tribe are immune from lawsuit in State Court. Such immunity arises whether or not the liability it assumed arose prior to the acquisition of that enterprise or company.

The jurisdiction where this assumed liability will be litigated is a function of the status of the entity that assumed that liability, not the status of the entity that sold it's assets and liabilities to that other entity. Assumption of the liabilities of a private non-tribal commercial enterprise, which liabilities would otherwise be subject to the jurisdiction of and litigation of in the State Court system, by an immune tribal entity does not equate to consent to the jurisdiction of the State Court system by that tribal entity. There can be no implied consent. The immune status of the tribal enterprise does not change merely due to the tribal entity's assumption of liability as part of the purchase of a company.

The Chief Operating Officer of Defendant Blue Lake Housing Authority (defendant Authority) declares: that the Authority is a tribal governmental instrumentality of the Blue Lake Rancheria, which is a federally recognized Indian Tribe; that the Tribe is organized under an IRA Constitution, which was approved by the Secretary of the Interior of March 22, 1989; that the Authority is an entity organized and operated by the Blue Lake Rancheria to promote the business and economic interests of the Tribe; that the Authority is engaged in the business of building homes and it is an arm of the Tribe in that it's business endeavors are dictated by the Tribe's Charter Development Corporation; that on June 30, 2004 the Authority acquired the assets and liabilities of J&L Properties, which ceased to exist as of that date; and that the Blue Lake Rancheria has a tribal claims ordinance that governs the filing and adjudication of claims against the Tribe or any of its business enterprises, including the Authority. (Declaration of

Michael Hansen, paragraphs 1-7.) The facts that the complained of conduct related to the alleged defective construction occurred prior to the defendant Authority's acquisition of J&L Properties' assets and liabilities and J&L Properties was not a tribal governmental instrumentality at the time of the complained of construction are not determinative as to the issue of whether or not defendant Authority is immune from being sued in the State Court system concerning those assumed liabilities. Defendant Authority's immunity is not dependent on the status of the prior business entity it acquired or the timing of the alleged conduct that allegedly injured the plaintiffs. Defendant Authority entered into a business agreement to purchase assets and assume liabilities as an arm of the Tribal government and there is no evidence before the court that in acquiring the assets and assuming the liabilities defendant Authority expressly consented to jurisdiction of the State Courts concerning any liabilities it assumed from the now apparently defunct J&L Properties. Therefore, plaintiffs can not maintain this lawsuit in the State Court system against defendant Authority or the defunct J&L Properties acquired by the Authority.

The court must also reject any argument that it is unjust under the circumstances to hold that the tribal entity is not subject to a lawsuit filed in a State Court where the tribal entity assumed the private developer company's liability after the private developer company had built the allegedly defective house. Under the controlling authorities immunity is clear and it is for Congress to change or limit such immunity. In holding that the tribal enterprise is immune from lawsuit in State Court where a tribal enterprise booked a banquet

room of a hotel not on the tribal reservation and an employee of that hotel was allegedly injured when employees of the tribal enterprise threw gifts into the crowd striking the hotel employee, the Third District found that any unjust result from such immunity was for the Congress to resolve and stated: "5. Tort suits are not excepted from the general immunity rule. "There are reasons to doubt the wisdom of perpetuating the doctrine . . . . Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. [Citations.] In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, *as in the case of tort* victims." (*Kiowa*, supra, 523 U.S. at p. 758, 118 S. Ct. 1700, italics added; see also id. at p. 766, 118 S. Ct. 1700 (dis. opn. of Stevens, J.) ["[T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships"]; *Trudgeon*, supra, 71 Cal. App. 4th at pp. 637, 644-645, 84 Cal. Rptr. 2d 65 [tort suit against tribal casino barred]; *Morgan*, supra, 103 Ariz. 425, 443 P.2d 421.) Any change or limitation of the doctrine (e.g., to exclude off-reservation tort suits) must come from Congress. (See *Kiowa*, supra, 523 U.S. at pp. 758-760, 118 S. Ct. 1700.)" (Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384, 389-390.)

On the other hand, plaintiffs are not without their remedies against the other entities and individuals involved in the development, construction or inspection of the subject home. Plaintiffs are free to maintain an

action against those other entities and individuals in the State Court system. In addition, plaintiffs can still resort to the tribal claims procedure in order to assert their claims against defendant Authority premised on their contention that the Authority assumed J&L Properties' liability for the alleged defective construction and personal injuries. The Third District has explicitly acknowledged that the remedy of resort to tribal claims proceedings can not be presumed to be unfair to the claimant: "Although the Tribe provides a mechanism to resolve civil suits, literally by means of a hearing before the sovereign, the tribal council, plaintiff refused to follow this procedure. (See *Morongo Band*, supra, 74 Cal. App. 4th at pp. 1420-1421, 88 Cal. Rptr. 2d 828 [Tribe waived immunity subject to specified conditions, which plaintiff failed to satisfy].) The Tribal ordinance applies "to all claims for money or damages, whether based on contract, tort or other cause of action." Plaintiff's counsel's letter to the Tribe states in part: "When I first submitted a claim to the council, I understood that the purpose of the submission was to provide the council with information so that its members could understand the case in order to grant a waiver of immunity." Any such understanding arose apart from the ordinance, which states in part: "Nothing in this Chapter shall be deemed to waive the sovereign immunity of the Redding Rancheria Tribe or any of its enterprises, officers, agents, or employees." (Cf. *Ninigret Dev. Corp.*, supra, 207 F.3d at pp. 29-31 ["explicit language broadly relegating dispute resolution to arbitration constitutes a waiver of tribal sovereign immunity, whereas language that is ambiguous rather than definite, cryptic rather than explicit, or precatory rather than mandatory, usually will not achieve that

end"].) Counsel's letter also states in part: "The less money Ms. Hansard gets, the better it is for the tribe. It is fundamentally unfair for her to have to submit her claim for adjudication to anyone in such a position." However, "We presume, in view of the Tribe's obvious incentive to maintain good relations with its business clientele, that the tribal court can and will fairly adjudicate the matter." (*Trudgeon*, supra, 71 Cal.App.4th at p. 645, 84 Cal. Rptr. 2d 65; accord *Ninigret Dev. Corp.*, supra, 207 F.3d at p. 34 ["The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine"]; *Calvello v. Yankton Sioux Tribe* (S.D. 1998) 584 N.W.2d 108, 116-117 [suit for wrongful termination of casino manager, "By our decision, Calvello might not be deprived of his day in court, but only his day in the court of his choice"].) Although plaintiff did not choose to interact with the Tribe and did not go into Indian country (as did the plaintiff in *Trudgeon*), we cannot assume the Tribe's claims mechanism operates unfairly. No doubt, plaintiff's employer would not re-let the banquet hall to the Tribe if its court system proved to be a sham, nor would other local businesses be eager to do business with the Tribe. Although a tribe's legal system may differ widely from the common law system, that does not mean the Tribe's system is fundamentally unfair. For example, according to plaintiff's counsel, this Tribe's system calls for a hearing before the tribal council, which has the power to render a binding decision, presumably without the onerous and lengthy jury trial procedures and appeals available in civil court. That members of the tribal council may share in tribal profits does not mean they

cannot be fair when presented with a just claim." (Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384, 390-391.)

In summary, the motions are granted.

TENTATIVE RULING # 4: THE MOTIONS TO QUASH SERVICE OF SUMMONS ARE GRANTED. NO ORAL ARGUMENT WILL BE PERMITTED (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS ORAL ARGUMENT IS REQUESTED BY COURT CALL OR PERSONAL APPEARANCE IN DEPARTMENT NINE AT 9:00 A.M. ON THURSDAY, FEBRUARY 23, 2006. IF THE COURT GRANTS THE REQUEST FOR A HEARING OF ORAL ARGUMENT, A HEARING DATE AND TIME WILL BE SET DURING THAT PERSONAL OR TELEPHONIC APPEARANCE.

Appendix E1

28 U.S.C.A. § 1605

Effective: October 6, 2006

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure
(Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or

any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the

Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the

vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty

and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period

during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

Cal.C.C.P. § 1293

Effective: [See Text Amendments]

West's Annotated California Codes Currentness
Code of Civil Procedure (Refs & Annos)
Part 3. Of Special Proceedings of a Civil Nature (Refs & Annos)
Title 9. Arbitration (Refs & Annos)
Chapter 5. General Provisions Relating to Judicial Proceedings (Refs & Annos)
Article 2. Venue, Jurisdiction and Costs (Refs & Annos)

§1293. Making of agreement as consent to jurisdiction of state courts

The making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement.

Appendix G1

ORDINANCE No. 03-02

AN ORDINANCE OF THE BUSINESS COUNCIL OF THE BLUE LAKE RANCHERIA OF CALIFORNIA ENACTING A TRIBAL ORDINANCE ENTITLED "TRIBAL CLAIMS ORDINANCE"

The Business Council for the Blue Lake Rancheria of California ("Tribe") hereby ordains as follows:

Section 1. Findings and Declarations. The Business Council for the Tribe finds and declares that:

1. The Tribe has limited financial resources to pay claims made against it for money or damages.

2. To ensure a timely and effective means of resolving claims against the Tribe without the necessity of litigation, an administrative claims procedure needs to be established by the Tribe.

3. An administrative claims procedure that requires the presentation of a claim to the Business Council prior to filing suit against the Tribe, will reduce litigation against the Tribe, protect the Tribe's assets, and expedite the payment of legitimate claims and money damages due members of the public arising from breaches of contract or the negligent acts of the Tribe's employees.

4. The purpose of this Ordinance is to establish an administrative procedure by which any person who believes the Tribe owes him or her money as a result of

a breach of contract or damage to person or property will be required to submit an administrative claim to the Business Council. Such a procedure will allow the Business Council to consider the merits of any claim and either approve or reject the claim as a precondition to the claimant filing a lawsuit against the Tribe.

5. The enactment of this Ordinance promotes the health, safety, and welfare of the Tribe, its members, and the public and is in the public interest.

Section 2. Adoption of New Ordinance Entitled: "Tribal Claims Ordinance". A new Ordinance Entitled "Tribal Claims Ordinance" is hereby adopted by the Blue Lake Rancheria of California and shall provide as follows:

TRIBAL CLAIMS ORDINANCE

1.010 Presentation of Claims as Prerequisite to Filing Suit. Except for claims for injury or damage arising out of the Tribe's Gaming Enterprise which are subject to the Blue Lake Rancheria of California Tort Claims Ordinance, all other claims against the Tribe or any of its business enterprises for money or damages shall be presented to the Business Council and acted upon as a prerequisite to suit thereon as further provided in this Ordinance. All such claims shall be presented as required by this Ordinance and within the time periods specified herein;

1.020 Claims Subject to Filing Requirements. The claims subject to the filing requirements under this Section shall include, but not be limited to, any and all claims for money or damages; any and all

claims by Tribal employees for fees, salaries, wages, mileage, or other expenses and allowances, and any and all claims by any federal, state, or local public entity. The provisions of this Section shall apply to any and all claims whether they relate to events, transactions, or occurrences that took place prior to or after the effective date of this Ordinance. Claims subject to the Blue Lake Rancheria Tort Claims Ordinance, governing the presentation and adjudication of tort claims arising out of the operation of the Tribe's Casino Enterprise, are not subject to the filing requirements of this Ordinance, but must be presented and adjudicated in accordance with the provisions of that ordinance as it now reads or as it may be amended or replaced.

1.030 Contents of Claim. A claim shall be presented by the claimant or by a person acting on the claimant's behalf and shall include the following: (1) the name and address of the claimant; (2) the address to which the claimant desires notices to be sent; (3) the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted; (4) a general description of the indebtedness, obligation, injury, damage, or loss incurred so far as it may be known at the time of presentation of the claim; (5) the name or names of the Tribal employee or employees causing the injury, damage, or loss, if known; and (6) the amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

1.040 Signature of Claimant. The claim shall be signed by the claimant or a person on the claimant's behalf. Claims against the Tribe or any of its business entities for supplies, materials, equipment, or services need not be signed by the claimant or on the claimant's behalf if presented on a bill-head or invoice regularly used in the conduct of business of the claimant.

1.050 Forms. The Business Council may provide forms specifying the information to be contained in claims against the Tribe or any of its business enterprises. If the Business Council provides forms pursuant to this Section, the claimant need not use such form if he/she presents his/her claim in conformity with Sections 1.030 and 1.040. A claim presented on a form provided pursuant to this Section shall be deemed to be in conformity with Sections 1.030 and 1.040, if the claim complies substantially with the requirements of the form or with the requirements of said Sections.

1.060 Amendment of Claim. A claim maybe amended at any time before the expiration of the period designated in Section 1.090 or before final action thereon is taken by the Business Council, whichever is later, if the claim, as amended, relates to the same transaction or occurrence which gave rise to the original claim. The amendment shall be considered a part of the original claim for all purposes.

1.070 Notice of Insufficiency of Claim. If, in the sole discretion of the Business Council or a person designated by the Business Council to evaluate the claim, a claim as presented fails to comply substantially with the requirements of this Ordinance

or the requirements of the form provided under this Ordinance, the Business Council or such designated person may, at any time within twenty (20) days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein. Such notice shall be given in the manner prescribed by this Ordinance. Where such notice is given, the claimant shall have 15 days to amend the claim. The Business Council may not take action on the claim during that time.

1.080 Effect of Failure or Refusal to Amend. If; within 15 days of the giving of notice of the insufficiency of his or her claim, the claimant fails or refuses to amend his or her claim, the claim shall be deemed denied.

1.090 Failure to Give Notice of Insufficiency Waiver of Defense Based on Defect or Omission. Any defense based on the insufficiency of a claim resulting from a defect or omission in the claim as presented is waived by the failure on the part of the Tribe to give notice of the insufficiency as provided in Section 1.070, except that, no notice need be given and no waiver shall result when the claim, as presented, fails to state either an address to which the claimant desires notice to be sent or an address of the claimant.

1.100 Time Limits for Presentation of Claims. A claim relating to a cause of action for death or for injury to a person or to personal property shall be presented as provided for in this Ordinance not later than the ninetieth (90th) day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented, as provided in this

Ordinance not later than one hundred eighty (180) days after the accrual of the cause of action.

1.110 Grant or Denial of Claim by Business Council.

(A) The Business Council shall grant or deny any claim within sixty (60) days after the claim is presented to the Business Council. The claimant and the Business Council may extend the period within which the Business Council is required to act on the claim by written agreement entered into before the expiration of such period.

(B) If the Business Council fails or refuses to act on the claim within the time prescribed by this Section, the claim shall be deemed to have been denied on the sixtieth day or, if the period within which the Business Council is required to act is extended by agreement pursuant to this Section, on the last day of the period specified in such agreement.

1.120 Notice of Denial of Claim.

(A) Written notice of the rejection of the claim or the Business Council's inaction on the claim, which is deemed a rejection of the claim by operation of law under this Ordinance, shall be given in the manner provided in Section 1.130. Such notice shall be in substantially the following form:

> Notice is hereby given that the claim which you presented to the Business Council of the Blue Lake Rancheria of California on *[indicate date]* was [indicate whether rejected, allowed,

allowed in the amount of $_____ and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable] on [indicate date of action or rejection by operation of law].

(B) If the claim is rejected in whole or in part, the notice required by Subdivision (A) above shall include a warning in substantially the following form:

WARNING

If your claim was based upon death or injury to a person or personal property, you have ninety (90) days from the date this notice was personally delivered or deposited in the mail to file a court action on this claim, otherwise, you have one hundred eighty (180) days from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.

1.130 Mailing or Service of Notice. The notice required by Section 1.110 shall be deemed given when it is either: (1) personally delivered to the claimant or the claimant's representative as specified in the claim or (2) when deposited in the United States mail addressed to the claimant or the claimant's representative as specified in the claim, first class postage prepaid.

1.140 Re-examination of Rejected Claim. The Business Council may, in its discretion, within the time described by Section 1.090 for commencing a court action on the claim, re-examine a previously presented claim in order to consider a settlement of the claim.

1.150 Sovereign Immunity. Nothing in this Ordinance shall be deemed to waive the sovereign immunity of the Blue Lake Rancheria of California or any of its enterprises, officers, agents, or employees.

Section 3. Effective Date Publication. This Ordinance shall take effect immediately after its adoption.

CERTIFICATION

The foregoing Ordinance was adopted at a regular meeting of the Business Council, with a quorum present, held on March 6, 2002, by the following vote:

AYES: 5
NOES: 0
ABSTAIN: 0
ABSENT: 0

_____/s/_____
Claudia Brundin, Chairperson

ATTESTED:

_____/s/_____
Secretary to the Business Council

MICHAEL J. LEVANGIE,
State Bar #160163
JEFFREY LONG,
State Bar #226618
PROUT • LEVANGIE
2150 Park Plaza Dr., Suite 420
Sacramento, California 95833
Tel: (916) 443-4849
Fax: (916) 923-2151

Attorneys for Defendant
Blue Lake Housing Authority,
successor in interest to J&L Properties,
wrongfully named herein as
J&L Properties dba JTS Communities

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF EL DORADO

RITA J. CARLS; NICOLAS ANTHONY BERNARDONI, a minor by and through his Guardian ad Litem PETER BERNARDONI; ANDREA R. BERNARDONI; a minor by and through her Guardian ad Litem PETER BERNARDONI,	)	CASE NO. PC 20050114
	)	**NOTICE OF MOTION AND MOTION TO QUASH SERVICE OF SUMMONS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SERVICE OF SUMMONS; DECLARATION OF MICHAEL HANSEN**
Plaintiffs,	)	
vs.	)	

JTS COMMUNITIES, INC.; J&L PROPERTIES dba JTS COMMUNITIES; BLUE LAKE HOUSING AUTHORITY; THE ADVANTAGE GROUP, NEW HOME MARKETING, INC.; NORTH STAR PLUMBING; DANIEL LONGACRE, and DOES 1 to 500, inclusive, Defendants.	)	DATE: February 23, 2006 TIME: 9:00 DEPT.: 9 FILED: JAN. 11, 2006

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on February 23, 2006, at 9:00 a.m., in Department 9 of the above-captioned court located at 3321 Cameron Park Drive, Cameron Park, California, defendant BLUE LAKE HOUSING AUTHORITY (Successor-In-Interest to J&L Properties), will move pursuant to Code of Civil Procedure § 418.10(a)(1) to quash service of the summons.

Defendant's motion to quash service of the summons pursuant to this special appearance is made on the grounds that Blue Lake Housing Authority (as the successor-in-interest to J&L Properties) is a proper defendant in this matter and that this Court lacks

personal jurisdiction over Blue Lake Housing Authority because Blue Lake Housing Authority is immune from suit under the Doctrine of Tribal Sovereign Immunity. Defendant's motion is based upon this Notice of Motion and Motion to Quash Service of Summons, Defendant's Request for Judicial Notice, the pleadings, the records and papers on file in this action, the Declaration of Michael Hansen filed concurrently herewith, as well as any oral and/or documentary evidence as may be presented at the hearing of this motion.

The tentative ruling, without rationale, can be obtained by calling (530) 621-6551 beginning at 1:30 p.m. on the court day preceding the date the matter is set on the Law and Motion Calendar. The written rationale and tentative rulings are also posted outside the assigned Department.

The tentative ruling and written rationale can be obtained via the Internet on the El Dorado County Superior Court web page at www.eldoradocourt.org on the court day preceding the date the matter is set on the Law and Motion Calendar. The written rationale can be viewed on the web page by clicking on the "Tentative Rulings" link and you will find the tentative rulings listed by Department and Calendar date. Simply click on the tentative rulings for the assigned

Department and then click on the date you wish to view.

DATED: January 9, 2006 **PROUT • LEVANGIE**

/s/
MICHAEL J. LEVANGIE
Attorneys for Defendant
Blue Lake Housing
Authority
Successor-In-Interest to
J&L Properties

Appendix H5

DECLARATION OF MICHAEL HANSEN

I, Michael Hansen, state and declare as follows:

1. I am the Chief Operations Officer of Blue Lake Housing Authority. I have personal knowledge of the matters stated herein and can testify competently thereto if called as a witness in this matter.

2. Blue Lake Housing Authority is a tribal governmental instrumentality of Blue Lake Rancheria. Blue Lake Rancheria is a federally recognized Indian Tribe. See Request for Judicial Notice served herewith.

3. The Tribe is organized under an IRA Constitution, which was approved by the Secretary of the Interior on March 22, 1989.

4. Blue Lake Housing Authority is an entity organized and operated by Blue Lake Rancheria to promote the business and economic interests of the Tribe.

5. Blue Lake Housing Authority is engaged in the business of building homes. It is an arm of the Tribe in that its business endeavors are dictated by the Tribe's five member Charter Development Corporation (CDC) which determines and manages the Tribe's economic activities.

6. On June 30, 2004, Blue Lake Housing Authority acquired the assets and liabilities of J&L properties, which ceased to exist as of that date.

7. Blue Lake Rancheria, as the governing body of Blue Lake Housing Authority, has a tribal claims ordinance which governs the filing and adjudication of claims against the Tribe or any of its business enterprises, including Blue Lake Housing Authority.

8. Blue Lake Housing Authority does not consent or agree to jurisdiction in the El Dorado County Superior Court. It has not, to my knowledge, through any act or communication, waived its Sovereign Immunity and comes before this Court only to contest the jurisdiction of this Court.

I declare under penalty of perjury under the Laws of the State of California that the foregoing is true and correct.

Executed this 5 day of January, 2006, at Folsom, California.

MICHAEL HANSEN
Declarant

/s/ Michael Hansen

Appendix 11

CONTRACT OF PURCHASE

BUYER Jerroll E. Carls & Rita Carls
SELLER J&L Properties
TRACT JTS Communities Serrano
CITY OF El Dorado Hills
COUNTY OF El Dorado
LOT 216
PLAN 82
ADDRESS 216 Knapp Ct.

1. PURCHASE PRICE AND PAYMENT
NOTE: IF THE BOX FOLLOWING THIS STATEMENT IS COMPLETED WITH AN "X" ADDENDUM "A" WILL BE ATTACHED HERETO ☒

PRICING

(A)	Purchase Price of Property (Per Schedule Dated N/A)	$332,376
(B)	Lot Premium	$ $0
(C)	Plus Optional Items ordered by Buyer:	$ $0
(D)	Total of Property and Options (Purchase Price).	$332,376

2. PAYMENT

(E)	Cash Payments Required of Buyer		
	(1)	Initial Deposit	$ 16,618
	(2)	Down payment required including above deposit	$ 16,626
	(3)	Estimated closing costs	$ 9,528
(F)	Balance due on purchase price:		

TOTAL CASH REQUIRED	$ 26,154
First Trust Deed Loan Amount Estimated Loan Interest 8.000%; Amortized over 30 Years	
Lender Cash	$315,750

3. PURCHASE AND SALE: Buyer agrees to purchase and Seller agrees to sell the Property under the terms of this Agreement. The escrow described in paragraph 12 below shall close on or before 04/03/00 ("Closing Date"), seller reserved the right to extend the close of escrow date for a period of up to 45 days as a result of construction delays for reasons beyond the sellers control. Seller to provide notification of required extension to buyer. Buyer to confirm estimated close of escrow date prior to securing a loan interest rate lock. The foregoing notwithstanding, should the Property not be ready for occupancy on or before the Closing Date (or extended closing date), all of Buyer's deposits against the Purchases Price shall be returned to Buyer within fifteen (15) days of the final Closing Date (or any mutual extension thereof) unless there has been a determination by a court or pursuant to arbitration that Buyer has defaulted, or unless Buyer has waived his right to a determination of default by a court or pursuant to arbitration pursuant to paragraph 5 below.

4. TERMINATION: DEFAULT

(A) Failure to Obtain Loan: If Buyer fails to qualify for the loan described in paragraph 2 above or is otherwise unable to obtain the loan for any reason within five (5) days after the date of acceptance of this Agreement by Seller, this transaction and all rights

hereunder may be terminated by Seller, but such failure not be deemed a default on the part of Buyer unless Buyer has provided inaccurate information with respect to Buyer's creditworthiness in connection with this Agreement or the application for such loan. If this transaction is terminated for any reason other than Buyer's default under the terms of this Agreement, Seller shall immediately refund to Buyer all sums deposited by Buyer.

5. ARBITRATION OF DISPUTES: Buyer and Seller expressly agree to submit any and all disputes regarding liquidated damages, based on alleged default of buyer to arbitration in accordance with the procedures set forth below pertaining to liquidated damages. Judgment upon the award rendered by arbitration may be entered in any court having jurisdiction hereof. The parties shall have the right to discovery in accordance with Code of Civil Procedure § 1283.05.

NOTICE: BY INITIALIZING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE ARBITRATION OF DISPUTES PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE ARBITRATION OF DISPUTES PROVISION.

IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY." WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE ARBITRATION OF DISPUTES PROVISION TO NEUTRAL ARBITRATION.

Buyer's Initials RC/JC Seller's Initials /s/
Liquidated Damages/Default: If Buyer fails to complete the purchase of the property by reason of a default of Buyer, Seller may pursue any remedy in law or equity that it may have against Buyer on account of the default: provided, however, that by placing their initials here, Buyer RC/JC and Seller /s/ agree that:

a) $16,618 an amount not to exceed the money remitted by buyer under terms of the Contract for acquisition of the subdivision interest (Purchase Money Deposit), shall constitute liquidated damages payable to Seller if Buyer fails to complete the purchase of the property because of a default by Buyer.

b) The payment of such liquidated damages to Seller shall constitute the exclusive remedy of Seller on account of any default by Buyer.

c) Liquidated damages shall be payable to Seller out of Buyer's purchase Money Deposit according to the following procedures:

1) The Seller shall give written notice ("Seller's notice and demand"), in the manner prescribed by Section 116.340 of the Code of Civil Procedure for service in a small claims action, to escrow holder and to Buyer that Buyer is in default under the Contract and that Seller is demanding that escrow holder remit $$16,618 from the Purchase Money Deposit to Seller as liquidated damages unless, within 20 days, Buyer gives escrow holder Buyer's written objection to disbursement of Purchase Money as liquidated damages ("Buyer's objection").

2) If Buyer fails to give escrow holder Buyer's objection within 20 days from the date of receipt of Seller's notice and demand: (a) escrow holder shall promptly remit the amount demanded to Seller; and (b) Seller is released from any obligation to sell the property to Buyer.

3) If Buyer gives escrow holder Buyer's objection within 20 days from the date of receipt of Seller's notice and demand, then the determination as to whether Seller is entitled to the disbursement of Purchase Money as liquidated damages, and every other cause of action that has arisen between Buyer and Seller under the Contract, except for claims for damages for latent or patent construction defects, shall be settled by arbitration in accordance with the consumer arbitration rules of the American Arbitration Association.

(i) Any fee to initiate the arbitration shall be paid by the Seller, provided that the arbitration costs and fees, including any initiation fee,

ultimately shall be borne as determined by the arbitrator.

(ii) The venue of the arbitration proceeding shall be in the county in which the properties located unless the parties agree to a different location.

Initials: Buyer(s) /s/RC /s/JC Seller /s/

Community: JTS Communities Serrano
Lot: 216 Buyer: Carls

(iii) The arbitrator shall be appointed within 60 days of the administrator's receipt of a written request to arbitrate the dispute. In selecting the arbitrator the provisions of Section 1297.121 of the Code of Civil Procedure shall apply. The arbitrator may be challenged for any of the ground listed therein or in Section 1297.124.

(iv) The arbitrator shall be authorized to provide all recognized remedies available in law or equity for any cause of action that is the basis of the arbitration.

(v) A judgement upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

SELLER AGREES TO INDEMNIFY AND HOLD ESCROW HOLDER HARMLESS FROM ANY CLAIM BY THE OTHER ARISING OUT OF ANY DISTRIBUTIONS MADE BY THE ESCROW HOLDER IN ACCORDANCE WITH, AND PURSUANT TO, THE PROVISIONS OF THIS SECTION.

4) If the determination as to whether Seller is entitled to the disbursement of Purchase Money as liquidated damages is referred to arbitration, any fee to initiate arbitration shall be paid by Seller, but the cost of arbitration shall ultimately be borne as determined by the arbitrator.

Seller agrees to indemnify and hold escrow holder harmless from any claim by the other arising out of any distributions made by escrow holder in accordance with, and pursuant to, the provisions of this paragraph.

6. DEPOSIT. Buyer hereby hands Seller the sum indicated in Section 2, above, as "Initial Deposit", which sum shall be deposited in escrow with a party not controlled by Seller not later than the next business day following acceptance of this Contract by Seller. In the event Seller does not accept the offer, Seller shall immediately return such sum or any check by which such sum is paid to Buyer.

7. IMPOUNDS, COSTS, FEES, ETC. Buyer agrees to pay in cash in addition to the Purchase Price of the Property, an amount required to cover the cost of a credit report, loan fee, monthly impound payment if required or negotiated with lender, owner's and

lender's policies of title insurance, Buyer's escrow fee, local transfer taxes, tax service, recordation of the deed conveying the property and such deeds of trust as are applicable thereto. Buyer's prorata portion of property taxes for the applicable tax year, Buyer's prorata portion of the current fire insurance policy and all Association dues required and such other closing costs as are customarily charged by the escrow holder, all herein referred to as Closing Costs and impounds.

8. LOAN.

(A) First Trust Deed Loan. The Balance Due on Purchase Price, as set forth in Section 2, above, is to be paid directly to Seller or to Seller's order, from the proceeds of a loan or loans to be obtained by Buyer, secured by a Trust Deed which shall be a first lien on the Property. Buyer hereby represents to Seller that (t)he(y) is qualified to obtain such a loan. The forms and content of all loan documents, including a promissory note providing for monthly payments of principal and interest over an amortization period and a first deed of trust securing said note, shall be as designated or approved by the lender selected by Buyer. Seller is in no way responsible for or representative of any lender or for any representation made by lenders. This Contract is not a loan application, loan approval or loan commitment. Buyer shall have the right to obtain the loan from a lender other than the lender specified in 2(E) Above. Within thirty (30) days of acceptance of the Offer By Seller, Buyer shall deposit or cause to be deposited into escrow written verification of an institutional lender's loan commitment to Buyer for a least the full Balance Due described above. In the event that Buyer does not

secure the necessary loan commitment within the time specified herein, Seller may, at its discretion, unilaterally terminate this Offer and cancel the escrow. Time is of the essence of this Agreement. Upon such termination, Seller shall return all funds deposited by the Buyer and Seller shall have no further obligation to Buyer.

(B) Change of Interest Rate or Loan Fee. The parties hereto acknowledge that the interest rates on a loan to finance the purchase of the subject property fluctuate and that the estimated interest rate set forth in Sections 2(E), above, may increase or decrease during the period between the date of this Contract and the date to which a lender commits to making a loan. Fluctuations are a matter of concern solely between Buyer and Lender and shall not affect the rights of obligations as between the parties hereto.

9. TITLE. Seller shall convey to Buyer title to the property by Grant Deed, subject to taxes and assessments through the year of closing; recorded covenants, conditions, restrictions, easements and mineral reservations; and zoning and other requirements of governmental authorities. Title company shall be Stewart Title.

10. COVENANTS, CONDITIONS AND RESTRICTIONS (if Applicable). By acceptance of the grant deed to the Property, Buyer shall be deemed to have accepted and agrees to comply with the provisions of the Declarations of Covenants, Conditions, and Restrictions applicable to the Property.

(A) HOMEOWNER'S ASSOCIATION AND ASSESSMENTS (if Applicable). The Buyer agrees to become a member of the homeowner's association and upon close of escrow the Buyer shall pay a pro-rated share of total monthly assessments for current and deferred maintenance of common area. Buyer agrees to pay monthly association dues.

11. ESCROW.

(A) Escrow Instructions. An escrow shall be opened at a time and with such escrow holder as may be designated by Seller. This agreement shall constitute initial Buyer's and Seller's escrow instructions. Buyer agrees forthwith upon request (and in no event later than five (5) days after notice to Buyer of such request) to execute and return such additional escrow instructions as requested by the escrow holder, which shall be in the standard form provided by the escrow company except to the extent that the provisions of this Agreement are to the contrary. In the event such escrow instructions are not executed and returned within five (5) days from the date notice of said instructions is given to Buyer, Seller shall have no further obligations to Buyer with respect to the Property and Seller shall return all funds deposited by the Buyer.

(B) Loan Application. Buyer is also required to submit a loan application and all documents required by the lender within five (5) days from the date hereof. If not so submitted, Seller, may at its option, terminate this Agreement and return to Buyer all sums deposited by Buyer, in which event Seller

shall have no further obligations to Buyer with respect to the property.

Buyer(s)
Initials
/s/RC
/s/

12. PRORATIONS. Escrow Holder shall be instructed to make the following prorations as of the close of escrow:

(A) Taxes. Real property taxes based upon the latest available tax bill. If the tax bill covers this and other properties, the amount for proration purposes will be provided by Seller and further approval by Buyer will not be required.

(B) Dues. Association dues (If Applicable)

(C) Fire Insurance Premium (If Applicable). It is understood that fire insurance premiums covering this and other property in the name of the Association have been prepaid one year in advance. Buyer agrees that the fire insurance proration will cover Buyer's prorata portion of such premium and understands that the premium paid as part of Association dues is being collected for the next year's premium on such policy.

13. NO ASSIGNMENT. Buyer hereby represents that he is buying the Property for his own account. This Agreement and the escrow established pursuant hereto may not be assigned or otherwise transferred, voluntarily or by operation of law, by Buyer without the written consent of Seller and any attempt to do so

shall be void and no effect. The escrow holder is and shall be instructed by Seller not to assist or participate in any way in the consummation of so-called "double-escrows". Buyer further acknowledges that he will not attempt to sell or advertise the Subject Property until after the close of escrow established pursuant hereto.

Initials: Buyer(s) /s/RC /s/JC Seller /s/

Lot: 216
Buyer: Carls

14. CHANGES FROM MODEL UNIT. It is understood and agreed that Seller is not building the property (and appurtenances, if any) specifically for Buyer nor to the precise specifications or design of any model displayed to or visited by Buyer. Seller reserves and shall have the right to make any changes or substitutions Seller deems necessary or desirable, provided such changes or substitutions are of equal or better value and which meet with the approval of the lender and the appropriate city or county department in the construction material, fixtures, and in anything else to be contained in the finished Property. Consultation with Buyer shall not, in any case, be deemed to waiver of Seller's right to make any such changes herein contemplated or provided. Any model and appurtenances and furnishings is displayed for illustration only and shall be deemed not to be an agreement or commitment by Seller to deliver the Property herein purchased by Buyer in exact accordance with such model and appurtenances. None of the appurtenances and f nishing shown in a model site are included in this agreement unless Buyer and Seller specifically agree in writing to deliver same as part of the purchase price, or as an optional item, as more fully set forth in section 16, of this Agreement.

15. OPTIONAL ITEMS:

(A) Selection. Buyer agrees to make any color and optional item selections from the choices offered by Seller or Seller's agents within fifteen (15) days after such choices are offered by Seller. If Buyer does not

make such selections within said time period, Seller may make such selection, which shall be final.

(B) Treatment of Option Deposits on Default. If, subsequent to the execution of this Agreement, Buyer requests any change or extras from Seller, a written change order shall be executed by Buyer and Seller, and Buyer shall deposit into escrow a cash deposit for prepayment of such extras. Said prepayment monies shall be released to the seller immediately. If Seller determines that Buyer has defaulted under the terms of this Agreement, disposition of the option deposit shall be made in accordance with the provisions of section 5, of this agreement.

16. INSPECTION OF PROPERTY. Buyer and Seller will make a joint inspection of the Property prior to close of escrow for the purpose of preparing a list of corrective work, if any, which may be necessary as agreed to by both parties. Any corrective work agreed to be performed by Seller as a result of said inspection and as set forth on said list shall not cause a delay of the closing of the escrow. Seller will complete all corrective work agreed to and acknowledged by Buyer and Seller in writing in a prompt manner. If neither Buyer nor Seller has requested nor made such an inspection prior to ten (10) days before the scheduled close of escrow, Buyer shall be deemed to have waived said inspection and Seller shall not be obligated to perform any corrective work other than ~~that~~ required to make the property habitable.

17. TIME FOR DELIVERY. Buyer agrees that, unless pursuant to a separate written agreement to the

contrary signed by Seller, Buyer shall have no right to possession or occupancy of the Property prior to the date of recordation of the deed thereto to Buyer and the recordation of the First Deed of Trust securing a loan, if any, to be made to Buyer on the property under the terms of this contract. If for any reason, Seller is unable to deliver the Property within the time specified herein, Buyer's remedy shall be rescission of this Agreement and return of all monies paid hereunder.

18. NOTICES. All notices to Buyer and Seller may be served personally or by ordinary or certified mail at the addresses of Buyer and Seller shown hereon or, if Buyer has occupied the Property at the address of the property. If notice is by mail, except as otherwise provided herein, notice shall be deemed served forty eight (48) hours after deposit in the mail, postage prepaid.

19. RECEIPT OF DOCUMENTS. By execution hereof, Buyer acknowledges that he has received, read and understands the Public Report of the Department of Real Estate, the Articles of Incorporation, By-Laws, the Declaration of Covenants, Conditions and Restrictions applicable to the Project (subject to Seller's right to modify before close of escrow) and the current operating budget of the Association (as applicable). No material change may be made to the aforementioned Articles, By-Laws or Declaration prior to the close of escrow without the prior written consent of Buyer which consent shall not be unreasonably withheld or delayed.

20. TIME OF ESSENCE. Time is of the essence of each of Buyer's obligations hereunder.

21. SEVERABILITY. If any term, condition or provision of this Agreement is declared illegal or invalid for any reason by a court of competent jurisdiction, the remaining terms, conditions and provisions shall, nevertheless, remain in full force and effect.

22. NO WAIVER. The Waiver by Seller of any term, condition or provision of this Agreement shall not be considered as a waiver of any other term, condition or provision hereof.

23. LEGAL ACTION. In the event legal action is brought to enforce or interpret any provision of this Agreement to the escrow instructions executed pursuant hereto, the prevailing party shall be entitled to costs and reasonable attorney's fees and shall be fixed by the court.

24. MISCELLANEOUS TERMS. Whenever the context of this agreement so requires, the masculine gender includes the feminine and neuter and the singular number includes the plural.

25. OFFER ONLY. BUYER ACKNOWLEDGES THAT (T)HE(Y) HAVE/HAS READ AND UNDERSTAND(S) EACH AND EVERY PART OF THIS AGREEMENT. EXECUTION BY BUYER(S) ALONE SHALL CONSTITUTE THIS DOCUMENT ONLY AS AN OFFER TO PURCHASE. UPON EXECUTION BY AN AUTHORIZED OFFICER OR AGENT OF SELLER AND DELIVERY OF A FULLY EXECUTED COPY HEREOF TO BUYER(S), THIS AGREEMENT SHALL BE BINDING UPON PARTIES AND MAY BE ALTERED, AMENDED OR CHANGED

ONLY BY AN INSTRUMENT IN WRITING SIGNED BY THE PARTIES HERETO.

This agreement constitutes the sole agreement between the parties with respect to the property. There are no collateral understandings, representations or agreements other than those contained herein. No salesperson, employee or agent of Seller has authority to make any representations to Buyer not in writing signed by an authorized representative of Seller or to modify the terms of this contract. All prior agreements whether oral or written are hereby superseded.

By its execution of this agreement, Seller hereby instructs escrow holder to pay The Advantage Group, New Home Marketing, Inc. ("Broker") through escrow a real estate brokerage commission in accordance with the provisions of the marketing agreement or other applicable listing agreement between Seller and Broker.

OFFER TO PURCHASE

Buyer /s/Rita Carls Date 3/18/00
/s/Jerroll E. Carls Date 3/18/00
Street Address 15335 Kenndey RD.
City Los Gatos State CA Zip 95032
Home Phone (650) 356-8626
Bus. Phone (650) 345-2200

RECEIPT FOR DEPOSIT

Sales Representative /s/Cheri Regan Date 3/15/00

Appendix I18

(Signature is NOT Acceptance)

ACCEPTANCE

Seller /s/ Date 3.21.00
By _____
(Signature IS Acceptance)

ADDENDUM A

THIS IS INTENDED TO BE LEGALLY BINDING CONTRACT. READ IT CAREFULLY.

BUYER	Jerroll E. Carls & Rita Carls
SELLER	J&L Properties
TRACT	JTS Communities Serrano
CITY OF	El Dorado Hills
COUNTY OF	El Dorado
LOT	216
PLAN	82
ADDRESS	216 Knapp Ct.
TITLE COMPANY	Stewart Title
PREPAYMENT FOR NON-STANDARD FEATURES	$16,618

The following terms and conditions are hereby incorporated in and made a part of the Contract of Purchase and Receipt for Deposit dated: 03/15/00.

1. Buyer's reservation deposit check has been returned and Buyer has provided full deposit via a cashier's check made payable to Title Company. Buyer is executing a Deposit Release Form instructing Title Company to release the deposit to Seller. The above identified prepayment of options will be credited to the Buyer in escrow. BUYER UNDERSTANDS THE TOTAL PREPAYMENT FOR NON-STANDARD FEATURES TO BE INCLUDED IN THE HOME IS CONSIDERED TO BE LIQUIDATED DAMAGES. THE LIQUIDATED DAMAGES ARE NON-REFUNDABLE SHOULD BUYER FAIL TO CLOSE ESCROW FOR ANY REASON.

2. Escrow to close within five (5) days of Buyer receiving the "Notice of Completion" on subject home. Notice of Completion is identified by the homebuyer's final "WALK-THROUGH" date. Should Buyer fail to close for any reason within this five (5) day period, Buyer will pay to Seller $1000 ($100 per day for 10 days), in advance beginning on the sixth (6th) day. This payment provides for Seller interest carry. After this ten (10) day period is completed, and Buyer has been unable to close escrow, the Seller reserves the right to terminate the existing Contract of Purchase. Seller may, at their discretion, extend the escrow for an additional period of time.

3. Buyer understands the ESTIMATED interest rate quoted on page 1 of the Contract of Purchase is an ESTIMATE ONLY. Interest rate "locks" can only be secured through your lending institution. If an interest rate "lock" is desired, Buyer is advised to contact your loan officer as soon as possible for a complete explanation of loan rate options.

4. As Buyers are not covered by the Builder's liability insurance, Buyers agree not to enter the homesite, except for scheduled walk-throughs with Seller personnel.

5. Seller to pay 1/2 of the City/County Transfer Tax. Buyer to pay 1/2 of the City/County Transfer Tax and 100% of the CLTA and Escrow Fees.

6. ANY construction changes or option modification requests accepted by Seller AFTER the feature selections and Contract of Purchase have been

completed will incur a $500 ADMINISTRATION FEE for EACH item changed. This ADMINISTRATION FEE will be IN ADDITION to the cost of the item requested.

The total purchase price of $332,376 includes the following options and upgrades (which total $0):

Options:

Included in price (1)

The undersigned acknowledge receipt of a copy of this page.

Date 3.21.00	3/18/00	Date	/ s /
Buyer	/s/Rita Carls	Seller	
Buyer:	/s/Jerroll E. Carls	Seller	

CONTRACT SUPPLEMENT/ADDENDUM [G1]

THIS IS INTENDED TO BE LEGALLY
BINDING CONTRACT. READ IT CAREFULLY.

BUYER	Jerroll E. Carls & Rita Carls
SELLER	J&L Properties
TRACT	JTS Communities Serrano
CITY OF	El Dorado Hills
COUNTY OF	El Dorado
LOT	216
PLAN	82
ADDRESS	216 Knapp Ct.
TITLE COMPANY	Stewart Title

The following terms and conditions are hereby incorporated in and made a part of the Contract of Purchase and Receipt for Deposit dated: 03/15/00.

Buyers will notify JTS Sales by March 22, 2000 of their decision to either take the $7500 Norwest Incentive off the Contract Price or use as a partial payment toward the infrastructure Bond.

The undersigned acknowledge receipt of a copy of this page.

Date	_____	Date	_____
Buyer	_____	Seller	_____
Buyer	_____	Seller	_____

Appendix I23

CONTRACT SUPPLEMENT/ADDENDUM

THIS IS INTENDED TO BE LEGALLY BINDING CONTRACT. READ IT CAREFULLY.

BUYER	Jerroll E. Carls & Rita Carls
SELLER	J&L Properties
TRACT	JTS Communities Serrano
CITY OF	El Dorado Hills
COUNTY OF	El Dorado
LOT	216
PLAN	82
ADDRESS	216 Knapp Ct.
TITLE COMPANY	Stewart Title

The following terms and conditions are hereby incorporated in and made a part of the Contract of Purchase and Receipt for Deposit dated: 03/15/00.

WARRANTY COVERAGE PROCEDURES

INTENT OF PARTIES

Home Owner(s) recognizes that the procedures described in this Warranty are the only methods by which Home Owner(s) may demand that JTS Communities correct alleged defects in the Home. JTS Communities and Home Owner(s) agree that all Disputes in any way related to the coverage of this Warranty shall be resolved according to the "Arbitration of Disputes" provisions of Section 5 of the contract of purchase.

In the event that Home Owner(s) is not satisfied with JTS Communities resolution to of a Warranty claim, the Home Owner(s) understands and agrees that this Warranty requires Homes Owner(s) to complete the entire process described below before filing any lawsuit against JTS Communities in state or federal courts. In addition, prior to proceeding with the Arbitration described in Arbitration of Disputes below, Home Owner(s) must give JTS Communities an adequate opportunity and access to the Home to inspect any alleged defect and to remedy such defect.

NEGOTIATION

a. The Parties each agree to participate in a good faith negotiations (the "Negotiation"), as described in this Section as the first step to resolving any Dispute.

b. Home Owner agrees that the Negotiation process described in this Section must be completed before Home Owner(s) can begin the Arbitration process described below.

c. If Home Owner(s) Disputes or is unsatisfied with JTS Communities resolution to a Warranty claim, Home Owner(s) must first give written notice to JTS Communities of such Dispute. The notice must contain the following information.

i. A description of the nature of the Dispute and a description of what the Home Owner(s) believes JTS Communities is obligated to do under the Warranty to resolve the Dispute.

ii. A description of the facts which the Home Owner(s) bases its belief that JTS Communities is obligated to provide Warranty service;

iii. A proposed date and time for a Conference with a JTS Communities representative. Date and time must be scheduled on a business day between twenty-five (25) and sixty (60) days after the date Home Owner sends the notice to JTS Communities. The Conference (the "Conference") shall be held at the Homes, unless otherwise agreed;

iv. The notice shall be addressed to JTS Communities at the adddress set forth in this Warranty. The notice and all other notices described in this Warranty must be sent either by (i) personal delivery, (ii) nationally-recognized overnight courier, prepaid with instructions for next business day delivery or (iii) prepaid certified or registered mail, return receipt requested.

d. Within ten (10) days of Home Owners' sending the Conference Notice Request, JTS Communities shall provide a follow-up to Home Owner(s) confirming the time of the Conference and stating the name and title of JTS Communities representative to attend the Conference.

e. Prior to the Conference, JTS Communities and Home Owner(s) agree that they will, in good faith, discuss and consider possible resolutions of the Dispute. At the Conference, the Parties' representatives shall confer together to resolve the

Dispute for a maximum period of two hours although the Parties may extend or adjourn the meeting by mutual agreement.

f. If, after such Conference, the entire Dispute has not been resolved, then Home Owner(s) may, but shall not be required to, proceed to Arbitration as described in Arbitration of Disputes below. If, as a result of the Conference, certain issues in the Dispute have been resolved, the Parties shall jointly state in writing these issues that have been resolved, and the issues which remain unresolved which will require Arbitration. Although Arbitration is the next formal step in the procedure, the Parties shall retain every right to continue to negotiate informally to resolve the Dispute following the Conference and prior to Arbitration.

g. In order to increase the likelihood that the Dispute can be informally resolved outside of the courts and to promote the free flow of candid discussion between the Parties, the Parties agree that any offers of compromise or settlement are not admissible as evidence in the Arbitration or any later litigation.

ARBITRATION OF DISPUTES

a. In the event that the Parties have completed Negotiation as required in the Negotiation Section above on Page 1, but failed to resolve the Dispute and provided that Home Owner(s) has given JTS Communities an adequate opportunity and access to the Home to inspect and remedy any alleged defects, then, if either of the Parties wishes to pursue the matter further, the unresolved aspects of the Dispute shall be resolved by Arbitration in accordance with the

Commercial Arbitration Rules then in effect of the American Arbitration Association.

b. Home Owner(s) and JTS Communities agree that in addition to the Commercial Arbitration Rules, the following additional rules shall govern the Arbitration; (i) the Arbitrator shall not be any present or past owner, officer, director, employee, consultant, agent, attorney, or any other representative of any home builder or real estate agent, or of any affiliate of any of them; (ii) the location for the Arbitration shall be at the Home or at such other place as is mutually agreed; (iii) a transcript may be made of the proceedings at either party's request; (iv) JTS Communities shall post the initial fee for such Arbitration although the Arbitrator shall have the discretion to require reimbursement of the fee in connection with any award; (v) the Arbitrator may act as a mediator to attempt to resolve the Dispute before commencing any formal Arbitration proceedings and; (vi) the Arbitration award shall state findings of facts and conclusions of law, including, if applicable, the Arbitrator's determinations whether the Dispute is covered by the Warranty and whether JTS Communities was given an adequate opportunity to the Home to inspect and remedy any alleged defect prior to Arbitration.

c. Home Owner(s) further recognizes that JTS Communities agrees to be bound by the results of the Arbitration. Regardless of the out come of the Arbitration, Home Owner(s) has the right to refuse to accept the results of Arbitration and take legal action in state or federal courts after the Arbitration decision had been issued. If Home Owner(s) so refuses to accept the Arbitration results and intends to take legal

action Home Owner(s) must first provide JTS Communities with thirty (30) days written notice of such intent to file a lawsuit. Upon receipt of such notice, Home Owner(s) agrees to give JTS Communities reasonable access to the Home so that JTS Communities may remedy any alleged defect during the 30-day period prior to Home Owners' filing of any lawsuit, which period may be extended for intervening circumstances beyond JTS Communities control.

WARRANTY COVERAGE PROCEDURES —Continued

STATUTE OF LIMITATIONS

A demand for Arbitration must be filed under the Rules of Commercial Arbitration within the time periods prescribed by the applicable statutes of limitations. The notice described in the Arbitration of Disputes, Section "C" shall not stop the running of any statute of limitations.

ACCEPTANCE OF ARBITRATION

The California Legislative requires that the following statement be included in all real estate contracts requiring Arbitration of Disputes:

Notice: By initialing in the space below you are agreeing to have any dispute arising out of the matter included in the "Arbitration of Disputes" provision decided by neutral arbitration as provided by California law and you are giving up any rights you may posses to have the dispute litigated in a court or jury trial. By initialing in the space below you are giving up your judicial rights to discovery and appeal unless those rights are specifically included in the "Arbitration of Disputes" provision. If you refuse to submit to arbitration after agreeing to this provision, you may be compelled to arbitrate under the authority of the California Code of Civil Procedure. Your agreement to this arbitration is voluntary.

We have read and understand the foregoing and agree to submit disputes arising out of this Warranty to neutral arbitration.

Home Owner's Initials: /s/RC /s/JC

Although the above provision is required by California law, by initialing below JTS Communities unequivocally/represents that this warranty gives the Home Owner(s) the right to file a lawsuit against JTS Communities in the event that Home Owner(s) is unsatisfied with the results of the conference proceedings and arbitration ruling, subject to paragraph 1 of this Warranty Coverage Dispute Addendum.

JTS Communities Initials /s/

AGREEMENT AND ACCEPTANCE

By signing in the appropriate area below, JTS Communities agrees to fulfill all of its obligations under this Warranty. By their signature(s), Home Owner(s) acknowledges receipt and understanding of the Warranty and acceptance of the Warranty in lieu of all other warranties, expressed or implied, including merchantability and fitness for a particular purpose.

The undersigned acknowledge receipt of a copy of this page.

Date 3/18/00 Date 3.21.00

Buyer /s/Rita Carls Seller /s/

Buyer /s/Jerroll E. Carls Seller _____

No. 07-1037

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APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RITA J. CARLS, and NICHOLAS ANTHONY BERNARDONI and ANDREA R. BERNARDONI, minors by and through their Guardian ad Litem PETER BERNARDONI,

Petitioners,

v.

BLUE LAKE HOUSING AUTHORITY as successor-in-interest to J&L PROPERTIES,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied because it presents no issue worthy of this Court's attention. In an unpublished opinion, the California Court of Appeal, Third District held that petitioners failed to produce any evidence and therefore were unable to rebut respondent's evidence that respondent Blue Lake Housing Authority (Blue Lake) did not waive its sovereign immunity. That decision made no new law. To the contrary, the California Court of Appeal decision is based simply on petitioners' failure to present sufficient evidence on the issues before the court.

The petitioners ignore the evidentiary basis for the California Court of Appeal ruling and mischaracterize the decision below as an expansion of tribal immunity. However, the ruling does not redefine the scope of tribal immunity because the opinion is narrowly based upon petitioners' failure to produce any evidence.

The petitioners allege no split of authority and review should be denied for that reason alone. The California Court of Appeal ruling also lacks extraordinary factors to justify review. The decision below is unpublished and it is not applicable to other individuals or transactions because the narrow scope of the ruling is based on the lack of discovery conducted and the lack of evidence presented by these particular petitioners. The ruling will not cause some new irreparable harm because it simply applies existing

law that requires individuals to present evidence in support of a claim of waiver of tribal immunity. The petitioners' failure to present evidence also produced an inadequately developed record.

The petition should be denied because it does not present a necessity to secure uniformity of decision, does not assert an important question of law, and does not present extraordinary factors to justify review.

STATEMENT OF THE CASE

A. Factual Background

On February 28, 2005, petitioners filed an action in El Dorado County Superior Court against respondent and others related to alleged construction defects in a home purchased by one of the petitioners, Rita Carls, in March, 2000. Petitioners' action alleges that respondent Blue Lake was the owner, developer and/or builder of the home.

Respondent filed motions to quash service of petitioners' First Amended Complaint. Respondent presented evidence in support of its motions to establish that it was a tribal governmental instrumentality of the Blue Lake Rancheria, a federally recognized Indian tribe, and that it did not waive its tribal immunity. Petitioners did not conduct any discovery on these issues and presented no evidence in support of their opposition to the motions to quash.

The evidence submitted by respondent Blue Lake was sufficient to establish that it was a tribal entity entitled to immunity, absent a waiver. Respondent Blue Lake submitted a declaration of its chief operations officer, Michael Hansen, stating that the Blue Lake Housing Authority was an arm of the Blue Lake Rancheria Tribe, organized and operated by the tribe to promote the business and economic interests of the tribe. Petitioners presented no evidence to the contrary.

Respondent's declaration stated that it acquired the assets and liabilities of J&L Properties on June 30, 2004. The declaration did not indicate whether there was an express or implied assumption of liabilities by respondent Blue Lake. The declaration did not state the manner of respondent Blue Lake's acquisition. Significantly, the declaration stated that respondent neither consented to nor agreed to jurisdiction in the state court and did not waive its sovereign immunity by any act or communication.

Petitioners did not conduct any discovery, did not produce a copy of the agreement between respondent Blue Lake and J&L, and did not present any evidence as to the nature of that transaction. Petitioners argued at the hearing on the motions to quash that respondent was bound to the terms of an alleged arbitration agreement between J&L Properties and Rita Carls, one of the petitioners. The only mention of an arbitration agreement in the record is in an unauthenticated Contract of Purchase attached to petitioners' complaint. Pet. App. I1-I31.

Significantly, the rights petitioners have asserted do not even arise under these contract provisions. The arbitration provisions relied upon by petitioners are limited in application to "disputes regarding liquidated damages, based on alleged default of buyer,"[1] Pet. App. I3, or to disputes between buyer and JTS Communities related to the coverage of the Warranty.[2] Pet. App. I26-I28. These contract provisions impose an obligation on the parties to arbitrate. Pet. App. I3-I5. Petitioners did not seek to arbitrate any of their claims.

The El Dorado County Superior Court granted the motions to quash stating that "there is no evidence before the court that in acquiring the assets and assuming the liabilities [respondent Blue Lake] expressly consented to jurisdiction." Pet. App. D9.

---

[1] Any default of buyer would have taken place prior to the March, 2000 close of escrow and thus prior to the June 30, 2004 transaction between respondent Blue Lake and J&L Properties.

[2] Any claim under the Warranty would have to be made prior to the expiration of the Warranty. Petitioners failed to produce the Warranty or any evidence as to whether the Warranty was still in effect at the time of the June 30, 2004 transaction between respondent Blue Lake and J&L Properties. Petitioners failed to produce any evidence as to whether the Warranty was assignable or transferable. The petitioners failed to produce any evidence that the Warranty covered items claimed by petitioners.

B. The California Court of Appeal's Decision

In an unpublished opinion, the California Court of Appeal, Third District, found that petitioners failed to produce any evidence to rebut respondent's evidence that it was a tribal business entity entitled to tribal immunity and that it did not waive this immunity. The California Court of Appeal concluded that respondent established it was an arm of the Blue Lake Rancheria, a federally recognized Native American tribe, based on the declaration of its chief operations officer.

The Court of Appeal held that the declaration shifted the burden to petitioner to challenge respondent Blue Lake's assertion of tribal immunity, relying upon *School Dist. Of Okaloosa County v. Superior Court*, 58 Cal.App.4th 1126, 1131 (1997). Pet. App. A4. The California Court of Appeal concluded that petitioners "submitted no *evidence* that [respondent] Blue Lake was not related to the function and purpose of the tribe" and that petitioners "submitted no evidence at all in opposition to [respondent] Blue Lake's motions." Pet. App. A7. The California Court of Appeal explained "[o]n this record, we must conclude [respondent] Blue Lake established it was an arm of the tribe, entitled to tribal sovereign immunity." Pet. App. A7.

When the California Court of Appeal turned to the issue of whether respondent had waived its immunity, it stated that "[t]he problem for [petitioners] once again is evidentiary." Pet. App. A9. The

Court of Appeal applied settled law when examining whether respondent Blue Lake waived its immunity. This settled case law requires any waiver of sovereign immunity to be "clear," *C & L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001), "unmistakable," *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1135 (9th Cir. 1995), and that a waiver "cannot be implied but must be unequivocally expressed," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006); *Demontiney v. United States*, 255 F.3d 801, 812-813 (9th Cir. 2001). Waivers are "strictly construed." *Ramey Const. v. Apache Tribe of Mescalero Reserv.*, 673 F.2d 315, 320 (10th Cir. 1982). There is a "strong presumption" against them. *Demontiney v. United States*, 255 F.3d at 811.

Petitioners do not argue that the California Court of Appeal applied the wrong standards or case law. The California Court of Appeal held that case law required petitioners to present evidence that any claimed waiver of immunity by respondent was unequivocal and clear. The court ruled that petitioners "failed to establish the unmistakable waiver necessary to show subject matter jurisdiction over [respondent] Blue Lake in this action" due to the lack of evidence submitted by petitioners. Pet. App. A10.

The California Court of Appeal did not expand sovereign immunity standards but instead focused on the petitioners' evidentiary shortcomings. The Court

of Appeal applied well-settled standards that do not conflict with any decision of this Court.

C. The California Supreme Court

The California Supreme Court denied review.

REASONS FOR DENYING THE PETITION

The decision of the California Court of Appeal presents no issue worthy of this Court's attention. The decision of the California Court of Appeal, Third District, is based on petitioners' failure to conduct discovery and to present sufficient evidence on the issues before the court. The petition does not describe any lack of uniformity of decisions on the issues presented. The opinion is not remarkable; it does not change any established law nor does it create new questions of law. The fact specific opinion does not apply to anyone other than these petitioners and this respondent and therefore does not raise any issue of national interest.

A. The California Court of Appeal's Decision Is Not in Conflict With Other Courts

The petitioners do not allege a split of authority. The petition should be denied because it does not present a necessity to secure uniformity of decision.

B. The California Court of Appeal Correctly Applied This Court's Precedents

The California Court of Appeal ruling does not depart from well established law. Nor does it create new questions of law. Petitioners do not assert that the state court ignored relevant law from this Court.

The petitioners' claim that sovereign immunity was expanded as a result of the ruling is unfounded. Petitioners do not, and cannot, point to any improper rule or standard applied by the California Court of Appeal. Petitioners instead complain of a misapplication of a properly stated rule of law and focus on the outcome of the Court of Appeal's ruling, rather than the manner in which the Court of Appeal reached that conclusion. The outcome was the result of petitioners' failure to provide evidence in support of their claims.

The California Court of Appeal made no effort to expand sovereign immunity. The lower court highlighted the limited scope of its ruling by stating that respondent Blue Lake "might" have waived its tribal sovereign immunity "as a theoretical premise" and that petitioners "might" have been able to establish a waiver of immunity if it provided a copy of the agreement between respondent Blue Lake and J&L Properties. The court ruled that "[w]ithout such evidence, [petitioners] failed to establish the unmistakable waiver necessary to show subject matter jurisdiction over [respondent] Blue Lake in this action." Pet. App. A10.

This case is an extraordinarily poor vehicle for deciding waiver of sovereign immunity issues because of the petitioners' failure to adduce any evidence of the transaction between respondent Blue Lake and J&L Properties in which a waiver is claimed to have been effectuated.

In addition, petitioners were not even seeking enforcement of the arbitration provisions upon which the waiver claim is based. Petitioners' premise that this case is just like *C & L Enterprises* is flawed since the only arguable waiver is contained in provisions pertaining to an arbitration which petitioners failed to pursue. Petitioners are claiming a right to sue that was not even negotiated in the contract with the non-tribal entity.

Petitioners do not assert an important question of law and the petition does not provide any basis for review.

C. The California Court of Appeal's Decision Does Not Create an Issue of Significant Importance and Compelling Need for Intervention by This Court

No extraordinary factors of national interest justify review. The decision below is unpublished and it is not applicable to other individuals or transactions. The narrow scope of the ruling is based on the lack of discovery conducted by petitioners and the lack of evidence presented by these particular individuals. The ruling will not cause some new irreparable harm

because it simply required these individuals to present evidence in support of a claim of waiver of tribal immunity.

The Court of Appeal held that "the problem for [petitioners] . . . is evidentiary." Pet. App. A9. The statement of facts in the Court of Appeal opinion found that "[petitioners] submitted no *evidence* [respondent] Blue Lake was subject to state suit for the liabilities of J&L Properties." Pet. App. A7. Petitioners fail to show how these evidentiary problems would apply to other individuals or create an issue of significant importance and compelling need for intervention by this Court. Further, there is a distinct absence of a minimally adequate record for this court to review.

CONCLUSION

Because this case is narrowly tied to its particular facts and presents no issue warranting review by this Court, the petition for a writ of certiorari should be denied.

Dated: April, 2008

Respectfully submitted,

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(3)

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No. 07-1037

In the

Supreme Court of the United States

RITA J. CARLS, and NICHOLAS ANTHONY BERNARDONI and ANDREA R. BERNARDONI, minors by and through their Guardian ad Litem PETER BERNARDONI,

Petitioners,

v.

BLUE LAKE HOUSING AUTHORITY as successor-in-interest to J&L PROPERTIES,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Third Appellate District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners Rita J. Carls, et al. (Ms. Carls), respectfully file this Reply to the Brief in Opposition (Opp.) filed by Respondent Blue Lake Housing Authority (Blue Lake).

I

THE RECORD IS FULLY DEVELOPED

The question presented in the petition is extremely narrow: "When a tribe voluntarily acquires a non-tribal business, with existing contract obligations, does sovereign immunity allow the tribe to repudiate those obligations?" Petition (Pet.) at i. On this question, the record is fully developed.

The record establishes that J&L Properties, a non-tribal business, had existing contract obligations at the time of its acquisition by Blue Lake, specifically warranty-related obligations under its home-purchase contract with Ms. Carls. Appendix (App.) at A7-8. The record also shows that the contract expressly authorizes arbitration and adjudication of warranty-related disputes by state and federal courts. App. at A8, I3, I16, I23-24, I26-27. Importantly, the record reveals that, by its own admission, Blue Lake is a tribal entity that voluntarily "acquired the assets ***and liabilities*** of J&L Properties"—including the obligations under the home-purchase contract. App. at A3 (emphasis added).

The question before the Court is whether *despite* these undisputed facts as fully developed in the record, a tribal entity like Blue Lake can *still* avoid liability in state or federal court for assumed obligations under the cloak of tribal immunity. Ignoring this narrow question, Blue Lake instead focuses on irrelevant evidentiary issues. It objects to the record's adequacy

on grounds that Ms. Carls "did not conduct any discovery" and "presented no evidence" on issues pertaining to (1) Blue Lake's tribal entity status, (2) its acquisition of J&L Properties, and (3) the arbitration and choice-of-law provisions in Ms. Carls's home-purchase contract. Opp. at 2-3. When considered in light of the question presented, none of Blue Lake's objections has any merit.

First, the petition does not put Blue Lake's tribal status at issue. Quite the contrary, the question presented specifically assumes that Blue Lake *is* a tribal entity. Pet. at i, 4.

Second, Blue Lake objects that Ms. Carls did not produce a copy of its merger agreement with J&L Properties or any other evidence regarding the nature of its acquisition of J&L Properties. Opp. at 2-3. Blue Lake contends that the absence of this evidence makes the petition a poor vehicle for review of the immunity issue. But Blue Lake's evidentiary objections only beg the question as framed in the petition.

The petition asks whether, given the undisputed facts in the record *and no more*, a tribal entity can still invoke sovereign immunity to shield itself from voluntarily assumed obligations. Blue Lake's admission that it acquired the liabilities of J&L Properties—coupled with the home-purchase contract providing for arbitration and adjudication of warranty-related claims in state or federal court—constitute sufficient evidence of Blue Lake's waiver of immunity. Whether, as Blue Lake argues, courts should require even more or different evidence than the present record contains is the issue Ms. Carls is asking this Court to resolve.

Moreover, Blue Lake's complaint that the record does not contain a copy of the merger agreement or other evidence of the transaction is highly suspect. If such evidence contained proof that Blue Lake preserved its immunity, one is left wondering why Blue Lake failed to produce it in the trial court. The present record paints a full enough—and uncontradicted—picture of the merger: By acquiring J&L Properties' liabilities, Blue Lake became the successor-in-interest to J&L Properties' preexisting contract obligations, including warranty-related obligations to Ms. Carls.

Third, Blue Lake makes passing reference to the fact that "[t]he only mention of an arbitration agreement in the record is in an unauthenticated Contract of Purchase attached to [Ms. Carls's complaint]." Opp. at 3. The objection is irrelevant, particularly as both the trial court and the court of appeal received the home-purchase contract into evidence. App. at A4, A8-A9. In any event, the record contains no evidence of Blue Lake's objection to the contract for lack of authentication, either in the trial court or in the court of appeal, making its authentication unnecessary. Cal. Evid. Code § 353(a).

II

EXPANSION OF TRIBAL IMMUNITY RAISES AN IMPORTANT FEDERAL QUESTION

The California Court of Appeal's decision in this case significantly expanded the scope of tribal immunity, thereby raising an important federal question. Blue Lake's arguments do not—and cannot—contest this fact.

This case is on all fours with *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). In *C&L Enterprises*, this Court held that a tribe waives its immunity by agreeing to a contract containing arbitration and choice-of-law provisions for adjudication in state or federal court. Here, Blue Lake agreed to acquire J&L Properties' assets and liabilities. One of those acquired liabilities was Ms. Carls's home-purchase contract, which contains the same arbitration and choice-of-law provisions at issue in *C&L Enterprises*.

That Blue Lake was successor-in-interest—as opposed to the original party—to Ms. Carls's home-purchase contract is a distinction without a difference: Blue Lake voluntarily acquired the obligations arising under that contract, which expressly recognizes arbitration and state- and federal-court jurisdiction over warranty-related disputes. The court of appeal *expanded* the scope of tribal immunity by significantly limiting the circumstances under which a *C&L Enterprises* waiver may occur.

Blue Lake ostensibly denies that the court of appeal expanded tribal immunity. Opp. at 8. It highlights the fact that the court of appeal's decision was based solely upon Ms. Carls's alleged "failure to provide evidence" of waiver. *Id.* As an example, Blue Lake cites the absence in the record of the merger agreement between it and J&L Properties. *Id.* at 9. But Blue Lake's argument only reinforces the conclusion that the court of appeal expanded tribal immunity by creating an unprecedented burden of proof for waivers that severely limits *C&L Enterprises*'s application.

It is true that the court of appeal required more evidence than Blue Lake's admission that it assumed J&L Properties' liabilities, including a contract with waiver language of the kind found in *C&L Enterprises*. The dissenting Presiding Justice seemed perplexed by the court's evidentiary demands. App. at A12-A13. But its requirement of more evidence is a reason to *grant* the petition, because it raises a significant federal question: Should the logic of *C&L Enterprises* be set aside and tribal immunity be expanded to protect tribes who voluntarily become successors-in-interest to the contractual obligations of non-tribal businesses—simply because they are not the *original* parties to those obligations?

Blue Lake also argues that the petition should be denied, because Ms. Carls's warranty claim under the home-purchase contract lacks merit. Opp. at 4, 9. Blue Lake asserts that the arbitration provisions containing the waiver language are limited, in part, to a warranty for which Ms. Carls produced no evidence in the trial court. *Id.* at 9. Blue Lake worries that, absent such evidence, it is unknown whether the warranty is still in effect, whether it was assignable, and whether it covers Ms. Carls's claims. Blue Lake's objections are off the mark.

The merits of Ms. Carls's warranty claim against Blue Lake as successor-in-interest to J&L Properties are not before this Court. Nor are the various issues of proof concerning the viability, nature, and scope of the warranty. All these questions are premature, because the antecedent question of whether Blue Lake may be sued in a California state court first must be resolved. Only *after* that jurisdictional issue has been settled can

the merits of Ms. Carls's claims—and of Blue Lake's affirmative defenses—be adjudicated.

Finally, Blue Lake claims the petition should be denied, because Ms. Carls "[was] not even seeking enforcement of the arbitration provisions upon which the waiver claim is based." *Id.* at 9. But the waiver-of-immunity provisions in the home-purchase contract go beyond arbitration and clearly contemplate "lawsuit[s] . . . in state or federal courts." App. at I23, 24, 26-27. Section 23 of the contract, for example, accepts state- or federal-court jurisdiction without specific reference to the enforcement of arbitration provisions:

> In the event legal action is brought to enforce or interpret ***any provision*** of this Agreement to the escrow instructions executed pursuant hereto, the prevailing party shall be entitled to costs and reasonable attorney's fees and shall be fixed ***by the court***.

App. at I16 (emphasis added).

Even if Blue Lake's characterization of the contract were correct, waiver of immunity from arbitration logically constitutes waiver of immunity from state- and federal-court adjudication. As the Alaska Supreme Court observed:

> There is little substantive difference between an agreement that any dispute arising from a contract shall be resolved by the federal courts and an agreement that any dispute shall be resolved by arbitration; both appear to be clear indications that sovereign immunity has been waived. Accordingly, we hold that [the tribal entity] waived whatever immunity from suit it possessed by entering

> into a contract with GC Contractors containing an agreement that any disputes arising under the contract would be resolved by arbitration.

Native Village of Eyak v. GC Contractors, 658 P.2d 756, 760-61 (Alaska 1983), cited approvingly in *C&L Enterprises*, 532 U.S. at 417.

III

THE FEDERAL QUESTION CONCERNING EXPANSION OF TRIBAL IMMUNITY HAS NATIONWIDE IMPLICATIONS

As described in the petition, expansion of tribal immunity in the commercial context presents a question of nationwide importance for the Court's consideration. Pet. at 15-19. Blue Lake does not contest this fact. It does not deny the far-reaching negative consequences of such expansion, particularly for unwitting non-tribe consumers. *Id.* at 15-17. Nor does it deny that expansion of tribal immunity advances none of the policies favoring Native Americans. *Id.* at 17-19.

Instead, Blue Lake claims the issue has no nationwide importance, because the court of appeal's decision "is unpublished and . . . not applicable to other individuals or transactions." Opp. at 9. The argument is a non-sequitur. The petition rests upon the far-reaching implications of *a federal question*—not of a particular court opinion. Put differently, the binding effect of an appellate-court opinion has no bearing on the importance of the federal question the court decides. If it did, no federal question decided by an appellate court could *ever* be important enough for this

Court's review, since even a published decision is binding only within the appellate court's very limited jurisdiction.

That the court of appeal's decision is unpublished is immaterial. The decision raised a federal question that transcends the specific facts and parties of this case, implicating the commercial transactions of tribal and non-tribal entities across the country. It is a question whose nationwide significance merits this Court's review.

CONCLUSION

For these reasons, the petition should be granted.

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Respectfully submitted,

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